138

①

Supreme Court, U.S.
FILED

09-274 AUG 31 2009

OFFICE OF THE CLERK

No. ______________

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,[1] DIRECTOR, ARIZONA
DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ROGER MARK SCOTT,

Respondent.

On Petition for Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Criminal Appeals/Capital
Litigation Section

(Attorney of Record)

J. D. NIELSEN
Assistant Attorney General
Criminal Appeals/Capital
Litigation Section
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686

---

[1] Pursuant to Supreme Court Rule 35(3), Mr. Ryan, the current Director of the Arizona Department of Corrections, has been substituted for Dora B. Schriro, the former Director.

CAPITAL CASE

QUESTIONS PRESENTED

Respondent Roger Mark Scott was convicted of participating in the 1989 murder of a 4-year-old child and sentenced to death.

After the Arizona trial court dismissed Scott's post-conviction proceedings, Scott moved to amend his dismissed petition in order to raise additional ineffective assistance of counsel claims. The trial court denied Scott's motion, finding that the applicable state procedural rule did not allow such an amendment after the initial petition had been dismissed. Scott filed a petition for review with the Arizona Supreme Court, but he did not address the merits of these new claims in the body of the petition, and only included them in an appendix.

On federal habeas corpus review, the United States Court of Appeals for the Ninth Circuit reversed a decision by the United States District Court for the District of Arizona and held that the state rule did not provide a basis for an adequate state procedural bar. Specifically, the court held that the rule was not "regularly followed or 'consistently applied' by the Arizona state courts," based on one Arizona Court of Appeals decision in which the state appellate court held that a state trial court improperly denied a convicted defendant's request for permission to file a *pro se* petition for post-conviction relief after his appointed counsel declined to file a petition. Additionally, the Ninth Circuit also refused to consider Scott's failure to fairly present his new ineffective assistance claims in the body of the brief he filed with the Arizona Supreme Court, as required by state procedure.

1. Can the application of a state procedural rule be characterized as "inadequate" under the adequate-state-ground doctrine—and therefore unenforceable on federal habeas corpus review—based upon one Arizona appellate case that involved the application of a different rule to different factual and procedural circumstances? *See Beard v. Kindler*, 2009 WL 273318 (February 2, 2009) (asking this Court to identify the proper inquiry to be conducted in determining the "adequacy" of a state rule), *accepted for certiorari review*, *Beard v. Kindler*, ___ U.S. ___, 129 S.Ct. 2381 (May 18, 2009).

2. Can a federal habeas court refuse to consider a state's procedural requirement that issues be raised in the body of a brief, rather than in an appendix, in determining whether a petitioner has fairly presented his claims to the state's courts? *See Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1780 (2009) (a petitioner must "properly raise his claims in state court"); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolved the claim on the merits.").

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENTS 9

I

A STATE PROCEDURAL RULE CANNOT BE CHARACTERIZED AS "INADEQUATE" UNDER THE ADEQUATE-STATE-GROUND DOCTRINE — AND THEREFORE UNENFORCEABLE ON FEDERAL HABEAS CORPUS REVIEW — BASED SOLELY ON THE INTERPRETATION OR APPLICATION OF A DIFFERENT RULE BY ONE OTHER STATE COURT TO DIFFERENT FACTUAL AND PROCEDURAL CIRCUMSTANCES. 9

II

A FEDERAL HABEAS COURT MUST CONSIDER A STATE'S PROCEDURAL REQUIREMENTS, RELATING TO PROPER ISSUE PRESENTATION, IN DETERMINING WHETHER A PETITIONER HAS FAIRLY PRESENTED HIS CLAIMS TO THE STATE'S COURTS 21

CONCLUSION 31

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

APPENDIX E E-1

APPENDIX F F-1

APPENDIX G G-1

APPENDIX H H-1

APPENDIX I I-1

APPENDIX J J-1

APPENDIX K K-1

APPENDIX L L-1

TABLE OF AUTHORITIES

Cases

Adams v. Robertson, 520 U.S. 86 (1997) 27
Baldwin v. Reese, 541 U.S. 27 (2004) 24, 29
Beard v. Kindler, ___ U.S. ___, 129 S.Ct. 2381 (2009), ... 7, 12, 20
Bell v. Cone, 543 U.S. 447 (2005) 10
Bradshaw v. Richey, 546 U.S. 74 (2005) 11
Campbell v. Louisiana, 523 U.S. 392 (1998) 27
Castille v. Peoples, 489 U.S. 346 (1989) 16, 21, 28
Central Union Telephone Co. v. City of Edwardsville, 269 U.S. 190 (1925) 15, 16
Coleman v. Thompson, 501 U.S. 722 (1991) 9, 23, 27
Cone v. Bell, ___ U.S. ___, 129 S.Ct. 1769 (2009) 9, 23, 25, 27
Darr v. Burford, 339 U.S. 200 (1950) 22
Dugger v. Adams, 489 U.S. 401 (1989) 12, 13, 17
Estelle v. McGuire, 502 U.S. 62 (1991) 11
Ford v. Georgia, 498 U.S. 411 (1991) 9
Heath v. Alabama, 474 U.S. 82 (1985) 27
House v. Bell, 547 U.S. 518 (2006) 20
Illinois v. Gates, 462 U.S. 213 (1983) 27
James v. Kentucky, 466 U.S. 341 (1984) 9
Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 23
Lambright v. Stewart, 241 F.3d 1201 (9th Cir.2001) 13, 17
Lambrix v. Singletary, 520 U.S. 518 (1997) 27
Lee v. Kemna, 534 U.S. 362 (2002) 9, 16
Lindh v. Murphy, 521 U.S. 320 (1997) 10
Mayle v. Felix, 545 U.S. 644, 655 (2005) 11

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 27
Mullaney v. Wilbur, 421 U.S. 684 (1975) 11
NAACP v. Alabama ex. Rel. Flowers, 377 U.S. 288 (1964) 16
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 16, 21, 23, 28
Parker v. Dugger, 498 U.S. 309 (1991) 10
Picard v. Connor, 404 U.S. 270 (1971) 23
Reese v. Baldwin, 282 F.3d 1184 (2002) 29
Ring v. Arizona, 536 U.S. 584 (2002) 10
Rose v. Lundy, 455 U.S. 509 (1982) 16, 21, 22, 28
Schriro v. Landrigan, 550 U.S. 465 (2007) .. 23, 29, 30
Scott v. Schriro, 567 F.3d 573 (9th Cir. 2009) 1, 5, 20, 11, 14, 17, 26
State v. Kemp, 912 P.2d 1218 (Ariz.1996) 6, 26, 27
State v. Miller, 921 P.2d 1151 (1995) 25
State v. Rodriguez, 903 P.2d 639 (App. Ariz. 1995) 5, 17-20
State v. Scott, 865 P.2d 792 (Ariz.1993) 2, 3
State v. Walden, 905 P.2d 974 (Ariz. 1995) 25
Staub v. City of Baxley, 355 U.S. 313 (1958) 16
Teague v. Lane, 489 U.S. 288 (1989) 14
Walton v. Arizona, 497 U.S. 639 (1990) 10
Woodford v. Visciotti, 537 U.S. 19 (2002) 10

Rules

Rule 32, Ariz. R. Crim. P. 18, 19
Rule 32.6(d), Ariz. R. Crim. P. 3, 4, 5, 6, 10, 12, 18
Rule 15, Fed. R. Civ. P 11
Rule 81(a)(2), Fed. R. Civ. P. 11
Rule 11, Habeas Corpus 11
Rule 9.05(7), Ore. R. App. P. 24

Constitutional Provisions

U.S. Const., amend. VI 3
U.S. Const., amend. VIII 3
U.S. Const., art. III, § 2 2
28 U.S.C. § 2242 11
28 U.S.C. § 2254 .... 3, 22
28 U.S.C. § 2254(1) 2
28 U.S.C. § 2254(b) 28
28 U.S.C. § 2254(c) 23
28 U.S.C. § 2254(d) 6, 10, 14, 28
28 U.S.C. § 2254(e)(1) 14, 28

Other Authorities

C.WRIGHT, A.MILLER & E.COOPER, FEDERAL PRACTICE AND PROCEDURE, VOL. 16B, 292 (2ND ED.1996) .. 12, 20

OPINION BELOW

The Ninth Circuit Court of Appeals' opinion is reported in *Scott v. Schriro*, 567 F.3d 573 (9th Cir.2009), and a copy is appended as Pet. App. A. A copy of the Arizona trial court's denial of Scott's motion to amend his petition is appended as Pet. App. D; a copy of the Arizona Supreme Court's order denying review without comment is attached as Pet. App. B. Copies of the order of the United States District Court regarding the procedural aspects of this matter, as well as its ultimate dismissal of Scott's habeas petition on its merits, are appended as Pet. Apps. E & F. Copies of the District Court's denials of Scott's motions for reconsideration are appended as Pet. Apps. G-K.

STATEMENT OF JURISDICTION

The Arizona Supreme Court affirmed Scott's death sentence on direct appeal. *State v. Scott*, 865 P.2d 792 (Ariz.1993). (Pet.App.C.) The state trial court denied Scott's petition for post-conviction relief, as well as his request to amend the petition after it had been dismissed, on December 11, 1996. (Pet. App. D.) The Arizona Supreme Court denied discretionary review without comment on June 24, 1997. (Pet. App. B.) The United States District Court denied Scott's petition for writ of habeas corpus on March 3, 2005. (Pet. App. F.) The Ninth Circuit reversed the district court's decision and remanded the case on June 2, 2009. (Pet. App. A.) This petition for writ of certiorari is timely filed within 90 days of that decision, and this Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The constitutional and statutory provisions involved are the Sixth and Eighth Amendments to the United States Constitution, and 28 U.S.C. § 2254.

STATEMENT OF THE CASE

James Styers shared an apartment with Debra Milke and Milke's 4-year-old son, Christopher. On Saturday, December 2, 1989, Styers placed Christopher in his automobile and picked up Styers' friend, Respondent Roger Mark Scott. Although Styers had told Christopher that they were taking him to a local shopping mall to see Santa Claus, the two men instead drove into the desert where Styers killed Christopher by shooting him three times in the back of the head. *Scott*, 865 P.2d at 795–96 (Pet.App.C. at 2–6.)

Styers, Scott, and Milke were charged with Christopher's murder and, after separate trials, all three were sentenced to death. On direct appeal, the Arizona Supreme Court affirmed their death sentences. (Pet. App. C.)

After the Arizona trial court subsequently denied Scott's post-conviction claims and dismissed his post-conviction relief proceedings, Scott moved, through new post-conviction counsel, to amend his original post-conviction relief petition to raise additional claims of ineffective assistance of counsel. The trial court denied Scott's motion, relying upon Arizona Rule of Criminal Procedure 32.6(d), which provides:

> After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

The court noted that the Rule only authorized a court to permit such an amendment "before a dispositive order issues," and that to grant Scott's requested relief "would be contrary to the underlying purpose of Rule 32 and inconsistent with its procedures." (Pet. App. D at 2; Pet. App. L.) The Arizona Supreme Court denied review of the trial court's ruling without comment. (Pet. App. B.)

In Scott's federal habeas corpus proceedings, the district court found that the additional claims of ineffective assistance of counsel that Scott attempted to raise were never fairly presented to the Arizona Supreme Court in a procedurally appropriate manner because the state trial court, in rejecting his attempted amendment, had relied upon Rule 32.6(d), which the district court found to be a state procedural rule that was regularly and consistently followed in Arizona. (Pet. App. E at 16–20.) The district court went on to find these claims procedurally defaulted, and ultimately denied Scott's remaining claim on its merits, denying his habeas corpus petition with prejudice on March 3, 2005. (*Id.*; Pet. App. F.)

On *de novo* review, the Ninth Circuit rejected the district court's procedural default ruling, finding that Rule 32.6(d) could not provide a basis for an adequate state procedural bar because it was not "regularly followed or 'consistently applied' by the Arizona state courts" in the manner applied by the state trial court in Scott's case. *Scott*, 567 F.3d at 581–82 (Pet.App.A. at 13.). The Ninth Circuit based its finding on its reading of one Arizona case, *State v. Rodriguez*, 903 P.2d 639 (App.Ariz.1995), in which the Arizona Court of Appeals held that a state trial court improperly denied a petitioner's request to file a *pro se* petition for post-conviction relief after his attorney declined to file a petition. *Scott*, 567 F.3d at 581–82 (Pet. App. A at 13–14.).

The Ninth Circuit attempted to bolster its decision by engaging in its own statutory interpretation of Rule 32.6(d), finding that the state court's interpretation of the rule in Scott's case was "contrary to the plain language" of the rule because the text did not specifically provide that amendment was not available after the underlying post-conviction proceedings had been dismissed. (*Id.* at 12.)

The Ninth Circuit also rejected the State's argument that Scott's same ineffective assistance claims were subject to another procedural bar because he never fairly presented them to the Arizona Supreme Court in a procedurally correct manner after the state trial court denied his petition for post-conviction relief and his request to amend the petition. Scott raised these claims in an appendix to a petition for review, but under the Arizona Supreme Court's case law, a claim raised only in an appendix is considered waived—to be considered by an Arizona court, a claim must be raised and argued in the body of a brief. *State v. Kemp*, 912 P.2d 1218, 1286 (Ariz.1996) (striking all issues raised solely in the appendix to an opening brief). The Ninth Circuit held that Arizona law on this point is irrelevant, because under its view, the fair presentation requirement "is an issue of federal law, not state law." (Pet. App. A at 15.)

SUMMARY OF ARGUMENT

The Ninth Circuit clearly erred and ignored basic principles of comity by rejecting the interpretation of an Arizona procedural rule by the Arizona trial court and the Arizona Supreme Court.

1. The Ninth Circuit's quantitative methodology, under which it characterized Rule 32.6(d) as "inadequate," and therefore unenforceable on federal habeas corpus review, is contrary not only to this Court's jurisprudence, but to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [the AEDPA], as well. The Ninth Circuit's requirement that a state prove that its procedural rule is "firmly established and regularly followed" is contrary not only to this Court's view that state courts are presumed to know and follow state law, but also with the "highly deferential" standards of 28 U.S.C. § 2254(d). Additionally, placing this burden of proof on a state is unfair, because where, as here, the rule is well-understood and regularly followed by litigants and the state's courts, it is unlikely that there will be a significant number of reported decisions on which the state can rely in attempting to meet the burden imposed by the Ninth Circuit.

Aside from placing an unfair burden of proof on the state, the methodology employed by the Ninth Circuit is susceptible to arbitrary and capricious application, and specifically so here, where the Ninth Circuit based its inadequacy finding upon only one other Arizona case, in which the state court applied a different state rule to different factual and procedural circumstances.

This case is similar to *Beard v. Kindler*, ___ U.S. ___, 129 S.Ct. 2381 (May 18, 2009), in which this Court recently accepted for *certiorari* review the issue of whether a state procedural rule is "adequate" if it is subject to discretionary application by the state courts. This case provides an appropriate avenue for the Court to clarify the proper methodology to be used in determining whether a state statute can be characterized as adequate. As in *Beard*, the inquiry here into the adequacy of a state procedural rule is far better served by an analysis focusing on whether a state rule provides a petitioner with adequate notice so that he may conform his conduct to it. Regardless, under any appropriate adequacy standard, a state statute should not be characterized as inadequate simply because of one other state case in which the court interpreted or applied a different state rule to different factual and procedural circumstances.

2. The Ninth Circuit's refusal to consider another basis for finding the same claims procedurally defaulted, *i.e.*, Scott's failure to fairly present the claims to the Arizona Supreme Court in a procedurally proper manner, is contrary to this Court's jurisprudence. The Arizona Supreme Court requires that all claims be raised and argued in the body of a brief, rather than in an appendix; thus, because Scott raised and argued his claims only in an appendix to his petition for review to the Arizona Supreme Court, he failed to provide the court a fair opportunity to

consider them. Moreover, the significance of the Ninth Circuit's erroneous decision goes far beyond its failure to follow this Court's jurisprudence. If an Arizona petitioner perceives that his constitutional claim might have a better probability of success on federal habeas corpus review than in the state courts, he could make a tactical decision to, in effect, hide the claim in an appendix or other attachment to his state brief, hoping that the state courts do not address the claim at all. Under the Ninth Circuit's opinion, if a petitioner successfully evaded any rulings by the Arizona courts, he would have nevertheless "fairly presented" the claim, and therefore preserved a right to federal habeas corpus review. Allowing a petitioner to circumvent the Arizona courts while preserving a right to subsequent *de novo* federal habeas corpus review violates the fundamental role that comity plays in the exhaustion requirement. It is also contrary to the AEDPA, which requires that claims be properly exhausted in state court.

REASONS WHY THE WRIT SHOULD BE GRANTED

There are two independent reasons that Scott procedurally defaulted his ineffective assistance of counsel claims in his state post-conviction proceedings. The Ninth Circuit ignored this Court's jurisprudence, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [the AEDPA], as well as basic principles of comity, by reversing the District Court's ruling that Scott's ineffective assistance claims are procedurally barred from federal collateral review.

I

A STATE PROCEDURAL RULE CANNOT BE CHARACTERIZED AS "INADEQUATE" UNDER THE ADEQUATE-STATE-GROUND DOCTRINE — AND THEREFORE UNENFORCEABLE ON FEDERAL HABEAS CORPUS REVIEW — BASED SOLELY ON THE INTERPRETATION OR APPLICATION OF A DIFFERENT RULE BY ONE OTHER STATE COURT TO DIFFERENT FACTUAL AND PROCEDURAL CIRCUMSTANCES.

Under the "adequate state ground" doctrine, federal habeas courts generally will not review state court rulings in cases involving issues of federal law as long as the ground for the decision rested on a point of state law that was "adequate" to support the ruling. *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1780 (2009) (citing *Coleman v. Thompson,* 501 U.S. 722, 729 (1991) and *Lee v. Kemna,* 534 U.S. 362, 375 (2002)). With regard to this adequacy requirement, this Court has stated that "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee,* 534 U.S. at 376 (quoting *James v. Kentucky,* 466 U.S. 341, 348 (1984) and citing *Ford v. Georgia,* 498 U.S. 411, 422–424 (1991)).

The Ninth Circuit's determination that the state courts misinterpreted the state procedural rule at issue is contrary to the provisions of the AEDPA, as well as this Court's jurisprudence that state courts are presumed to know and follow state law. *See, e.g., Bell v. Cone*, 543 U.S. 447, 455 (2005) ("As we have said before, § 2254(d) dictates a '"highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt.") (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997) and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)); *Parker v. Dugger*, 498 U.S. 308, 314–15 (1991) ("We must assume that the trial judge considered all this evidence before passing sentence. . . . Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence.") (internal citations omitted); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions."), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002).

The state rule at issue here is straight-forward and understandable:

> After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

Ariz. R. Crim. P. 32.6(d) [1996]; *see also Scott*, 567 F.3d at 581 (Pet. App. A at 12.). The state court construed the rule to be inapplicable in Scott's case because his underlying post-conviction proceedings had already been dismissed.[2] (Pet. App. D at 2.). This construction is based on logic and common sense–once a petition for post-conviction relief has been dismissed, there is nothing left to "amend." Thus, it is not surprising that the state court's construction of the rule in Scott's case is nearly identical to this Court's characterization of Federal Rule of Civil Procedure 15. Although there is no language in Rule 15 specifically barring amendment of a pleading if the underlying proceedings have been dismissed, this Court has nevertheless read the Rule to generally include such a bar. *See Mayle v. Felix*, 545 U.S. 644, 655 (2002) ("The Civil Rule governing pleading amendments, Federal Rule of Civil Procedure 15, made applicable to habeas proceedings by § 2242, Federal Rule of Civil Procedure 81(a)(2), and Habeas

---

[2] The Ninth Circuit disagreed with the state court's construction, noting that the text of the rule does not specifically bar amendment in such situations, and then held that the state court's construction was therefore "contrary to the plain language [of the rule]." *Scott*, 567 F.3d at 580–81 (Pet. App. A at 11–12.). However, the Ninth Circuit lacked jurisdiction to question the state court's interpretation of the state procedural rule. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.") (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) and *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

Corpus Rule 11, allows pleading amendments with 'leave of court' any time *during a proceeding.*") (emphasis added).

With regard to the "regularly followed" prong of the traditional adequacy analysis, this Court has noted that in circumstances where a state rule "has been faithfully applied" in "the vast majority of cases," this adequacy requirement is met. *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). However, the Court "has never articulated a coherent modern [adequacy] rationale, and it is not easy to weave a pattern from the threads of its opinions." C.WRIGHT, A.MILLER & E.COOPER, FEDERAL PRACTICE AND PROCEDURE, VOL. 16B, 292 (2ND ED.1996). Thus, legal development regarding adequacy has been uneven and inconsistent in the lower courts, as most recently illustrated by this Court's grant of *certiorari* review in *Beard*, 129 S.Ct. at 2381.

The question this Court will answer in *Beard* is whether a state procedural rule can be considered adequate, and thus provide a basis for the procedural default of a claim in a subsequent federal habeas corpus proceeding, if the state rule is subject to discretionary application by the state courts. *See Beard v. Kindler*, 2009 WL 273318 (February 2, 2009), *1, **6–7. Scott's case presents the Court with the same type of discretionary rule, since Ariz.R.Crim.P.32.6(d) permits amendment only upon a showing of "good cause." Additionally, the instant case also presents the Court with an opportunity to identify the proper inquiry to be conducted in determining adequacy—whether a federal court can reject a state court's interpretation of a state procedural rule as part of the inquiry, and whether a state procedural rule can be characterized as inadequate based upon the application of a different state rule by one other state court to different factual and procedural circumstances.

In setting out its methodology concerning its adequacy analysis, the Ninth Circuit stated:

> "[P]rocedural default is an affirmative defense, and *the state has the burden* of showing that the default constitutes an adequate and independent ground" for denying relief. *Insyxiengmay* [*v. Morgan*, 403 F.3d 657, 665 (9th Cir.2005)] (emphasis added). . . .
>
> To constitute an adequate and independent state procedural ground sufficient to support a state court's finding of procedural default, "a state rule must be *clear, consistently applied, and well-established at the time* of petitioner's purported default." *Lambright v. Stewart,* 241 F.3d 1201, 1203 (9th Cir.2001) (citations omitted) (emphasis added). A state rule is considered consistently applied and well-established if the state courts follow it in the "vast majority of cases." *See Dugger*

> *v. Adams,* 489 U.S. 401, 411 n. 6, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).[3]

Scott, 567 F.3d at 580 (Pet.App.A. at 10–11.).

While the Ninth Circuit's quantitative analytical methodology purports to be based upon this Court's expansive language regarding adequacy, it is flawed, both in its general application, as well as the manner it was applied in Scott's case.

The Ninth Circuit's quantitative approach is contrary to the fundamental structure of federal habeas corpus law. A habeas corpus petitioner who mounts a direct constitutional challenge to a state court procedural bar, on the ground that it is inconsistent with due process, must exhaust the claim in state court, overcome *Teague v. Lane*, 489 U.S. 288 (1989), and clear the deference hurdles provided in 28 U.S.C. § 2254(d) and (e) (1) of the AEDPA. However, under the Ninth Circuit's methodology, a petitioner making the same sort of arguments, but in the guise of an "adequacy" challenge, need do none of that. Yet if the petitioner prevails, he achieves substantially the same result: relief from his default, and the virtual annulment of the state procedural bar in future habeas cases. The "adequacy" analysis should not be used to avoid the normal requirements of federal habeas corpus review.

---

[3] In *Dugger*, the Court did not require that, for a state rule to be considered adequate, it must be followed in the "vast majority of cases." Rather, as previously discussed, the *Dugger* court simply noted that in circumstances where a state rule "has been faithfully applied" in "the vast majority of cases," it satisfies the adequacy requirement. 489 U.S. at 411 n.6.

Apart from being inconsistent with the AEDPA and this Court's jurisprudence, requiring the state to prove that a state rule is adequate is unfair because, as in Scott's case, it is a burden that often cannot be met. If a rule is well-understood and regularly followed by litigants and the state courts, then there may likely be little, if any, significant litigation construing or applying it. This leads to a Catch-22 situation—because a rule is well-understood and regularly followed by litigants and the state courts, there are no significant reported decisions concerning it, and because of this lack of reported decisions, the state cannot prove that the rule is well-understood and regularly followed.

Because the construction of the rule in Scott's case is based on logic and common sense, the fact that there are no other contemporaneous state opinions applying it in the same manner does not demonstrate that the rule was not regularly and consistently applied; rather, it demonstrates the opposite—that the rule was well-understood and regularly followed by litigants and the state courts. *See, e.g., Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 195 (1925) (because the state court's interpretation was not "forced or strained . . . it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it.").

Aside from placing an unfair burden of proof on the state, the methodology employed by the Ninth Circuit is also contrary to sound public policy. The Ninth Circuit's approach encourages states to blindly follow procedural rules, rather than basing their application upon justice and fairness. Instead, some imprecision in the application of a state procedural rule should be tolerated to encourage equitable treatment of particular circumstances that may be difficult to quantify. Moreover, if a state procedural rule was applied without exception, it would probably be attacked as an "exorbitant application[]," *Lee*, 534 U.S. at 376, as "pointless severity," *NAACP v. Alabama ex. Rel. Flowers*, 377 U.S. 288, 297 (1964), or as an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Additionally, the Ninth Circuit's approach encourages federal habeas corpus courts to micro-manage the manner in which state courts apply their state procedural rules, which is contrary to this Court's long-standing jurisprudence that state courts have exclusive power to prescribe their own rules of practice, and that those rules "are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of" state law. *Central Union Telephone Co.*, 269 U.S. at 195. Moreover, it is also contrary to the integral role that comity plays in federal habeas corpus jurisprudence. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Regardless, notwithstanding these concerns of federalism and comity, it is the state courts, rather than reviewing federal habeas corpus courts, that are in the best position to determine whether non-compliance with a rule is appropriate:

> [This] Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts.

16B WRIGHT & MILLER, at 385–86, 403.

Finally, the Ninth Circuit's quantitative methodology is easily susceptible to arbitrary and capricious application. Other than quoting *Dugger* for the proposition that a state rule is adequate if it is followed in the "'vast majority of cases,'" *Scott*, 567 F.3d at 580 (Pet.App.A. at 11.), the Ninth Circuit failed to identify what, if any, additional factors were or should have been considered in determining whether the state rule was "clear, consistently applied, and well-established at the time of petitioner's purported default." *Id.* (quoting *Lambright*, 241 F,3d at 1203). Certainly the Ninth Circuit's methodology offers *no* guidance where, as here, due to the logical and common sense meaning of the state rule, there are no reported state cases construing or applying it in the same manner.

The application of this quantitative methodology was especially arbitrary and capricious in Scott's case, where the Ninth Circuit based its finding that the Arizona rule was not consistently interpreted to bar amendment of a petition after the underlying proceedings had been dismissed, on only one case—*State v. Rodriguez*, 903 P.2d 639 (Ariz.App.1995). The Ninth Circuit failed to explain how the existence of one state case, which it construed as interpreting or applying the rule differently, demonstrates that the rule was not "clear, consistently applied, and well-established." Moreover, because the Ninth Circuit's methodology focuses on the manner in which a state rule is construed or applied by state courts, it opens up the possibility that, because the federal court is unfamiliar with state law and procedure, it may misinterpret the state rules and decisions it is examining—exactly what happened in Scott's case.

Contrary to the Ninth Circuit's assertion, the decision in *Rodriguez* was not based on Rule 32.6(d) and does not compel the conclusion that the Rule is not regularly and consistently applied. In *Rodriguez*, the petitioner filed a notice of state post-conviction relief, and counsel was appointed at his request. 903 P.2d at 639. Counsel informed the state court that he was unable to find any viable claims, and asked that the petitioner be granted an additional 30 days to file a *pro se* petition for post-conviction relief. *Id.* Although the prosecutor did not object, the state court denied counsel's request, and also ordered that the "petition" be dismissed, although no petition had been filed. *Id.* at 639–40. The petitioner filed a motion for a rehearing, which was denied, and then filed a petition for review to the Arizona Court of Appeals. *Id.* at 640. The reviewing court's only substantive reference to Rule 32.6(d) concerned the court's rejection of the petitioner's argument that a former version of that rule applied to him:

> Initially, we reject defendant's argument that because he was tried for

> conduct that occurred in 1991, these post-conviction proceedings were subject to the former version of Rule 32. Former Rule 32.6(d) permitted liberal amendment of a petition prior to entry of judgment. However, with one exception not applicable here, the 1992 amendments to Rule 32 apply "to all post-conviction relief petitions filed on and after September 30, 1992." Supreme Court Order, 171 Ariz. XLIV (Sept. 24, 1992). Defendant filed his notice of post-conviction relief on February 28, 1994; therefore, this case is governed by the current version of the rule.

Rodriguez, 903 P.2d at 640. Because no petition had been filed on the petitioner's behalf, there was nothing to amend. Thus, the case turned on an entirely different Arizona procedural rule:

> *Rule 32.4(c)* provides that the post-conviction relief petition must be filed by counsel within sixty days of appointment but that, "[o]n a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition." Good cause exists when, as in this case, appointed counsel does not indicate until the sixty-day period has expired that he declines to file a petition. *See Montgomery v. Sheldon,* 181 Ariz. at 259–60, 889 P.2d at 617–18.

> We grant review of defendant's petition and grant relief by vacating the dismissal of the Rule 32 proceeding and remanding to the trial court with instructions to grant defendant a thirty-day extension *under Rule 32.4(c).*

Rodriguez, 903 P.2d at 641 (emphasis added).

The Ninth Circuit's misinterpretation of *Rodriguez* illustrates the inherent flaws in its quantitative approach to determining adequacy. As the State of Pennsylvania points out in *Beard*, the inquiry into adequacy is far better served by an analysis focusing on whether a state procedural rule provides a petitioner with adequate notice so that he may conform his conduct to it. *Accord* WRIGHT & MILLER, VOL. 16B, 387 ("[T]he most generally functional test is that state law must afford a fair opportunity to present federal claims."). Under this more appropriate approach, if there is a reasonable likelihood that non-compliance with the rule will cause a default, and the petitioner nevertheless fails to comply, he should be bound by the consequences. "Adequacy" review should require no more, because the twin exceptions to the procedural default doctrine, "cause and prejudice," and the existence of a "fundamental miscarriage of justice," *see House v. Bell*, 547 U.S. 518, 536 (2006), are adequate safeguards against injustice.

Scott's case, coupled with *Beard*, provides an appropriate avenue for the Court to clarify the proper methodology to be used in determining whether a state rule can be characterized as adequate. Under the state rule in question, Scott had more than reasonable notice that, if he wanted to amend his petition, he had to do so before his initial petition for post-conviction relief was dismissed. Regardless, under any appropriate adequacy standard, a state rule should not be characterized as inadequate solely because one other state case interprets or applies a different state rule to different factual and procedural circumstances.

This Court should grant certiorari review of the Ninth Circuit's ruling.

II

A FEDERAL HABEAS COURT MUST CONSIDER A STATE'S PROCEDURAL REQUIREMENTS, RELATING TO PROPER ISSUE PRESENTATION, IN DETERMING WHETHER A PETITIONER HAS FAIRLY PRESENTED HIS CLAIMS TO THE STATE'S COURTS.

The requirement that a state prisoner must exhaust his claims in state court before he may be granted federal habeas corpus relief "is grounded in principles of comity and reflects a desire to 'protect the state courts' role in the enforcement of federal law.'" *Castille*, 489 U.S. at 349 (quoting *Rose*, 455 U.S. at 518). Comity requires "that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Boerckel,* 526 U.S. 838, 844 (1999) (citing *Rose,* 455 U.S. at 515–516, and *Darr v. Burford,* 339 U.S. 200, 204 (1950)).[4]

The exhaustion principle has been codified in 28 U.S.C. § 2254:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . .

---

[4] The exhaustion requirement also has a pragmatic basis—"federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Rose,* 455 U.S. at 519.

> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

This Court has held that the purpose of § 2254(c) is to promote comity by requiring state prisoners to "give state courts a fair opportunity to act on their claims." *Boerckel*, 526 U.S. at 844 (citing *Castille*, 489 U.S. at 351 and *Picard v. Connor*, 404 U.S. 270, 275–276 (1971)). In meeting this duty of fair presentment, a petitioner must necessarily raise his claims in accordance with a state's procedural rules, because "a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 732. *See Cone*, 129 S.Ct. at 1780 (a petitioner must "*properly* raise his claims in state court") (emphasis added); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.")

In *Schriro v. Landrigan*, 550 U.S. 465 (2007), in finding that the petitioner was not entitled to an evidentiary hearing because he failed to fairly present his claim to the Arizona courts, this Court noted that the petitioner raised his claim "for the first time in a motion for rehearing from the denial of his postconviction petition" and that, "[u]nder Arizona law, a defendant cannot raise new claims in a motion for rehearing." *Id.* at 479 n.3 (internal citations omitted). Similarly, in *Baldwin v. Reese*, 541 U.S. 27 (2004), in finding that the petitioner failed to fairly present his claim to the Oregon courts, this Court noted that "Oregon Rule of Appellate Procedure 9.05(7) (2003) instructs litigants seeking discretionary review to identify clearly *in the petition itself* the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal, "including appropriate authorities." *Id.* at 31 (emphasis added).

Here, Scott did not raise the additional ineffective assistance claims in the body of his amended petition for review to the Arizona Supreme Court. Instead, he included them in an appendix to his petition. The summary denial by the Arizona Supreme Court does not address those claims, nor is there anything in the denial itself that suggests that the supreme court actually considered these claims. Similarly, the Arizona trial court did not consider the merits of these claims. This is understandable, because the only issue before the Arizona courts was procedural—whether Scott could amend his post-conviction relief petition after the post-conviction proceedings had been dismissed. The merits of the underlying additional claims were never at issue.

Regardless, the Arizona Supreme Court would not have considered the additional underlying claims, because under its own procedural rules all claims must be raised and argued in the body of a brief, rather than in an appendix:[5]

> Kemp raises 12 issues in the appendix to his opening brief. Argument, however, must be in the body of the brief. We therefore strike the text contained in the appendix of Kemps' opening brief. All of these issues, which we list in our Appendix, are waived. Counsel, to avoid preclusion, must briefly argue the issue in the body of the brief. As we said in *Walden*, "[a] list of issues in the brief is not adequate. *Nor may the argument be in the appendix.*"

Kemp, 912 P.2d at 1286 (emphasis added, internal citations omitted) (quoting *State v. Walden*, 905 P.2d 974, 984 (Ariz. 1995)). *See also State v. Miller*, 921 P.2d 1151, 1160 (1996) (claim raised in footnote waived).

---

[5] In *Cone*, this Court noted that it has "no . . . duty to apply state procedural bars where state courts have themselves declined to do so." 129 S.Ct. at 1782. However, this is not a case where the Arizona supreme court "declined" to apply its rule requiring that a claim be raised and argued in the body of a brief because, as previously noted, the only issue before the Arizona courts was whether Scott could amend his post-conviction petition after the underlying proceedings had been dismissed.

In finding that Scott fairly presented his additional claims to the Arizona Supreme Court, the Ninth Circuit panel refused to give effect to Arizona's procedural law requiring that all claims must be raised and argued in the body of a brief:

> Scott included his ineffective assistance of counsel claims in the appendix of his petition for review to the Arizona Supreme Court. He explicitly referenced his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. He also stated the operative facts on which each of the claims were based and cited federal case law to support his arguments. The only issue the state contests is whether including the claims in an appendix in a petition for review to the Arizona Supreme Court satisfied the fair presentation requirement for purposes of exhaustion. *This is an issue of federal law, not state law.* We hold Scott did accomplish a full and fair presentation of his claims to the Arizona Supreme Court. Scott included a copy of the amended petition for post-conviction relief he sought to file in the post-conviction court in the Appendix to his petition for review filed with the Arizona Supreme Court.

Scott, 567 F.3d at 582 (Pet. App. A at 15.) (emphasis added).

The Ninth Circuit correctly recognized that whether a claim is fairly presented to a state's highest court is "an issue of federal law. . . ." However, contrary to its analysis, the inquiry does not end there because, under federal law as determined by this Court, in order to be subject to potential federal habeas corpus relief, the claim must first have been presented to the state courts in accordance with the procedural rules of that state. *Cone*, ___ U.S. at ___, 129 S.Ct. at 1780 ("[W]e have held that when a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review.") (citing *Coleman*, 501 U.S. at 731); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) ("With 'very rare exceptions' . . . we will not consider a petitioner's federal claim unless it was either addressed by, *or properly presented to*, the state court that rendered the decision we have been asked to review.") (emphasis added) (quoting *Adams v. Robertson*, 520 U.S. 86, 86 (1997) (citing *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217–219 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). This is because "[a] State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997).

The significance of the panel's erroneous decision goes far beyond its failure to follow *Cone* and *Coleman*, and its corresponding vitiation of the Arizona Supreme

Court's rule requiring that claims be raised in the body of a brief. Rather, the decision will ultimately allow Arizona petitioners to manipulate the state review process to obtain subsequent federal habeas corpus review. For example, if an Arizona petitioner perceives that his constitutional claim might have a better probability of success upon federal habeas corpus review than in the state courts, he may reasonably wish to avoid a merits determination by the state courts, which would be entitled to deference due to the limited review under 28 U.S.C. § 2254(d), as well as the presumption of correctness under 28 U.S.C. § 2254(e)(1). Consequently, to avoid a merits determination by the Arizona courts, as well as a state procedural ruling that could form the basis for a subsequent federal procedural default ruling, the petitioner could make a tactical decision to, in effect, hide the claim in an appendix or other attachment to his state brief, hoping that the state court does not address the claim at all. Under the court of appeals decision here, if this petitioner successfully evaded any rulings by the Arizona courts, he would have nevertheless "fairly presented" the claim, and therefore preserved a right to federal habeas corpus merits review of his claim. Allowing a petitioner to circumvent the Arizona courts while preserving a right to subsequent federal habeas corpus merits review violates the fundamental role that comity plays in connection with the exhaustion requirement, as recognized by this Court in *Boerckel*, *Castille*, and *Rose*. It is also contrary to the AEDPA, which requires that claims be exhausted in state court. 28 U.S.C. § 2254(b).

This case represents the third time the Ninth Circuit has recently misinterpreted this Court's jurisprudence concerning fair presentation. In *Reese v. Baldwin*, 282 F.3d 1184, 1193–94 (9th Cir. 2002), the Ninth Circuit held that the federal nature of a claim was fairly presented to the Oregon supreme court, because that court had the opportunity to read a lower Oregon court opinion which had sufficiently identified the claim as being based upon federal law. This Court succinctly disagreed:

> We begin by assuming that Reese's petition by itself did not properly alert the Oregon Supreme Court to the federal nature of Reese's claim. On that assumption, Reese failed to meet the "fair presentation" standard, and the Ninth Circuit was wrong to hold the contrary.
>
> . . .
>
> [W]e consequently hold that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

Baldwin, 541 U.S. at 30–32. Subsequently, in *Landrigan*, in reversing the Ninth Circuit's decision granting the petitioner an evidentiary hearing,[6] this Court pointed out that the petitioner's claim was not fairly presented to the Arizona courts, because it was first raised in a motion for rehearing, and that under Arizona law claims cannot be raised for the first time in such motions. 550 U.S. at 479 & n.3.

The Ninth Circuit panel decision is not only contrary to this Court's precedent, it completely ignores the doctrine of comity by vitiating Arizona's procedural rules. It is also contrary to the provisions and purposes of the AEDPA. If allowed to stand, the decision will allow petitioners to circumvent Arizona court rulings on claims and preserve a right to subsequent *de novo* federal habeas corpus review.

---

[6] *See Landrigan v. Schriro,* 441 F.3d 638 (9th Cir. 2006).

CONCLUSION

For these reasons, the State respectfully requests that the Court grant the petition.

Respectfully submitted,

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Criminal Appeals/Capital
Litigation Section
(Attorney of Record)

J. D. NIELSEN
Assistant Attorney General
Criminal Appeals/Capital
Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

541014

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Roger Mark Scott, *Petitioner-Appellant,*	No. 05-99012
v.	D.C. No. CV-97-01554-PGR
Dora B. Schriro, *Respondent-Appellee.*	OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
July 15, 2008—San Francisco, California

Filed June 2, 2009

Before: Alex Kozinski, Chief Judge, Jerome Farris
and Carlos T. Bea, Circuit Judges

Per Curiam Opinion

COUNSEL

Jon M. Sands, Michael L. Burke, Jennifer Y. Carcia, Federal Public Defender's Office, Phoenix, Arizona, for the petitioner-appellant.
Terry Goddard, Kent Cattani, J.D. Nielsen, Office of the Attorney General of Arizona, Capital Litigation Section, Phoenix, Arizona, for the respondents-appellees.

OPINION

PER CURIAM:

Roger Scott, an Arizona state prisoner sentenced to death, appeals the denial of his petition for a writ of habeas corpus in federal district court. When a state prisoner files such a petition, the district court will usually not hear any claim the petitioner did not first present to the state courts. This process is referred to as the prisoner "exhausting" his state remedies. Nor will the district court decide a claim denied by a state court because the petitioner failed to follow a rule of state procedure that is both adequate and independent of federal law. To be considered "adequate," the state rule must be one that is consistently applied by the courts of that state in the same manner it was applied to the current petitioner's case.

The dispositive issue in this case is whether the Arizona Superior Court relied on an adequate state bar, consistently applied, by the Arizona courts when it denied Scott's state petition for post-conviction relief. We conclude it did not. It held Arizona Rule of

Criminal Procedure 32.6(d) ("Rule 32.6(d)") prohibited Scott from filing an amendment to his previously-dismissed Arizona post-conviction petition for relief. His amendment alleged Scott had suffered ineffective assistance of counsel at his trial. In doing so, the post-conviction court ignored Arizona precedent holding such a petition could be so amended. *See State v. Rodriguez,* 903 P.2d 639, 641 (Ariz. Ct. App. 1995) (holding a post-conviction court has the authority under Rule 32.6(d) to allow the filing of an amended petition upon a showing of good cause, even after the court has already dismissed the first petition). Scott's first petition for post-conviction relief was filed in 1995. Accordingly, the amended Rule 32.6(d) was not an "adequate" state procedural rule that barred subsequent federal review of Scott's ineffective assistance of counsel claims. We will remand those claims for the district court to consider in the first instance.

We reverse the district court's denial of Scott's petition in part and remand to the district court to hold an evidentiary hearing and rule on the merits of these claims. We affirm the district court's ruling that Scott was not prejudiced solely by his counsel's failure to present a recommendation for leniency from the victim's father as mitigation evidence. Nevertheless, on remand the district court should hold an evidentiary hearing and consider whether the failure to present such a recommendation from the victim's father, combined with the failure of Scott's counsel to submit other mitigating evidence as discussed below, resulted in prejudice.

I. Facts and Procedural History

This case stems from the premeditated murder of a four-year-old named Christopher Milke. Christopher's mother, Debra Milke, her roommate James Styers, and Styers's friend, Roger Scott, were each tried separately for first-degree murder, conspiracy to commit murder, kidnapping, and child abuse. All were convicted.

At Scott's trial, he was represented by Roland Steinle. The State's theory of the case was that Scott, Styers, and Debra Milke planned to kill Christopher to claim $5,000 from a life insurance policy covering Christopher, which Debra had taken out through her work. Scott was to receive $250. Scott testified during trial that he was only a dupe, lured into helping his friend Styers after the fact. However, Scott had given a full confession to the police of his own role in the planning and execution of the kidnapping and murder of Christopher. Scott confessed he drove with Styers and Christopher out into the desert, where Styers shot Christopher. Scott led the police to Christopher's body, the firearm used to kill Christopher (which was in Scott's closet), and a pair of bloody shoes worn by Styers when he shot Christopher.[1]

After a jury trial, Scott was found guilty of first-degree murder, conspiracy to commit murder, and kidnapping.[2] The relevant facts of the case are set forth

---

[1] Because the defendants were each tried separately, we caution that the facts recited herein relate only to the trial of Scott, and must not be considered by us or by other courts in the cases against James Styers and Debra Milke.

[2] Scott was also convicted of child abuse, but that conviction was

(Continued)

in the Arizona Supreme Court's opinion affirming Scott's conviction. *State v. Scott,* 865 P.2d 792, 795-96 (Ariz. 1993). The details of the facts supporting the underlying conviction, horrible as they are, are not important for purposes of this appeal. Scott does not contest his conviction; he contests only his sentence.

Scott received the death penalty for the first-degree murder charge, and consecutive terms of imprisonment totaling 47 years-to-life for the conspiracy and kidnapping charges. When sentencing Scott, the trial judge found three statutory aggravating factors:[3] (1) Scott committed the murder as an accomplice for pecuniary gain; (2) the murder was "heinous" and "depraved" because it was a senseless murder and the victim was helpless; and (3) Scott was an adult and the victim was under the age of fifteen. Ariz.Rev.Stat. § 13-703(F)(5), (6), (9). The court also found four non-statutory mitigating circumstances: (1) Scott's cooperation with the police in investigating the crime; (2) his conduct while incarcerated and during trial; (3)

(Continued).

overturned by the Arizona Supreme Court on direct appeal.

[3] Under Arizona law as it existed at that time, the trial judge, not the jury, determined whether aggravating circumstances existed. While this fact might have been a ground for a successful appeal under *Blakely v. Washington,* 542 U.S. 296 (2004)-indeed Scott's counsel raised the issue on direct appeal--*Blakely* does not apply retroactively to cases on collateral review. *Schardt v. Payne,* 414 F.3d 1025, 1036 (9th Cir. 2005). Similarly, this would have been a valid claim under *Ring v. Arizona,* 536 U.S. 584 (2002), but *Ring* also does not apply retroactively to cases on collateral review. *Schriro v. Summerlin,* 542 U.S. 348, 358 (2004). Scott was tried and convicted in 1991.

his "bond of love" with his mother; and (4) his psychological history. However, the judge concluded these mitigating factors did not outweigh the aggravating factors and imposed the death penalty.

Scott's conviction and sentence were affirmed on direct appeal to the Arizona Supreme Court. *Scott,* 865 P.2d at 806. That court found one additional mitigating factor: Scott's lack of any prior felony convictions. *Id.* After adding this additional factor to the mitigating factors found by the trial court, the Arizona Supreme Court held the aggravating factors still carried more weight and affirmed Scott's death sentence. *Id.* This procedure of re-weighing the evidence is allowed under Arizona law. *See State v. Gallegos,* 870 P.2d 1097, 1117-18 (Ariz. 1994).

During the Arizona post-conviction proceedings, Neil Bassett initially represented Scott. Pursuant to Arizona law at the time, the post-conviction court was the same Superior Court where Scott's trial was held. The same judge heard the proceedings. Bassett raised a single issue: whether Scott's trial counsel, Steinle, rendered ineffective assistance of counsel by his failure to submit proper proof of the victim's father's recommendation for leniency at sentencing.

Prior to its decision, Scott had written the Arizona post-conviction court repeatedly, seeking to have the court replace Bassett with new counsel. He told the court Bassett refused to communicate with him. Scott even wrote the court, stating he had fired Bassett. The court ignored Scott's letters and did not hold a hearing to determine whether Scott was seeking to represent himself or whether new counsel should be appointed. Instead, the court summarily denied the petition for post-conviction relief in a minute order. Scott then filed a formal motion to represent himself, and Bassett filed a motion to withdraw and to allow new counsel an extension of time to file a motion for rehearing or other filing. The court granted Scott's motion for an extension of time and appointed new counsel, Rachel Yosha.

The court gave Yosha 30 days, plus one extension, to make her first filing in the case. Within the time allowed, Yosha filed motions to vacate the denial of the petition for post-conviction relief and for leave to file an amended petition raising 23 additional claims. As good cause for Scott's failure to file all his proposed claims in his first petition, Yosha argued Scott's previous counsel, Bassett, had been ineffective–a claim accepted by the post-conviction court when it granted the motion for new counsel.

Among the proposed claims in the amendment to his petition for post-conviction relief were claims that Scott's trial counsel, Steinle, provided Scott ineffective assistance of counsel when Steinle failed to accept a plea bargain offer for second-degree murder, even though Scott said he wanted to accept the offer, and even though Steinle recognized the offer was "the only viable way [for Scott] to avoid the death penalty" given his confession. Rather than plead guilty to second-degree murder, Scott went to trial and was found guilty of first-degree murder, as his confession meant he would be. At sentencing, Steinle also failed to present several mitigating circumstances, including evidence of four traumatic head injuries Scott had suffered, a brain scan showing Scott's brain had atrophied, evidence Scott suffered from seizures, as well as evidence of the plea bargain offer which Scott wanted to accept but Steinle rejected.

The motions filed by Yosha contained the legal and factual bases for each claim Scott wished to make in the post-conviction petition for relief. The post-conviction court denied the motions, holding it had "no authority" under Arizona Rule of Criminal Procedure 32.6(d) to allow the filing of an amended petition because the motion was filed after the original petition had been denied.

Following the post-conviction court's denial, Scott filed a petition for review with the Arizona Supreme Court seeking review of denial of his petition for post-conviction relief and the denial of his motion to amend his petition.[4] Yosha attached the proposed amended petition in the appendix to Scott's brief.[5] The amended petition contained the 23 additional claims Scott sought to bring. The Arizona Supreme Court summarily denied the petition without comment.

---

[4] Under Arizona law, cases involving a capital offense are appealed directly to the Arizona Supreme Court, bypassing the Arizona Court of Appeal. Ariz. R. Crim. P. 31.2(b).

[5] In relevant part, Arizona Rule of Criminal Procedure Rule 32.9(c)(1)(iv) provides that in petitions for review in capital cases, "all references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition."

Scott then filed a timely pro se petition for writ of habeas corpus in federal court. He was appointed new counsel, who filed an amended petition, raising many of the claims Scott had raised both on direct appeal and in his amended petition for post-conviction relief to the state courts. The district court held the only claim Scott had exhausted in state court was the one ruled on by the state post-conviction court on the merits–that failure to present a recommendation for leniency by the victim's father, Mark Milke, constituted ineffective assistance of counsel. The district court denied this claim on the merits. The court held Scott's other proposed claims, including his ineffective assistance of counsel claims, were procedurally barred from federal review because: (1) the state's denial of post-conviction relief was based on an adequate and independent rule of state procedure; and (2) the claims stated in the proposed petition for post-conviction relief had not been fairly presented to the state courts, and thus they were not "exhausted" in state court.

On appeal to this court, Scott contends the district court erred when it held the following three additional ineffective assistance of counsel claims were procedurally barred from federal review: (1) Steinle rendered ineffective assistance of counsel because he failed to challenge the voluntariness of Scott's statements to the police; (2) Steinle rendered ineffective assistance of counsel because he did not investigate and present mitigating evidence of Scott's mental deficiencies during the sentencing phase; and (3) appellate counsel rendered ineffective assistance of counsel because he failed to challenge the trial court's finding Scott committed the crime for pecuniary gain.

II. Analysis

We review *de novo* a district court's dismissal of a habeas petition for procedural default based on a finding that: (1) the state court's denial of relief was based on adequate and independent state rule of procedure or (2) the petitioner failed to exhaust the claims in state court. *Insyxiengmay v. Morgan,* 403 F.3d 657, 665 (9th Cir. 2005).

A. Procedural Default

1. Adequate and Independent State Procedural Bar

[1] Normally, a habeas petitioner carries the burden on appeal. Sometimes, however, the burden rests with the state. "Procedural default is an affirmative defense, and *the state has the burden* of showing that the default constitutes an adequate and independent ground" for denying relief. *Insyxiengmay,* 403 F.3d at 665 (emphasis added). Once the state meets that burden of proof, the burden on all remaining issues shifts to the petitioner.

[2] To constitute an adequate and independent state procedural ground sufficient to support a state court's finding of procedural default, "a state rule must be *clear, consistently applied, and well-established at the time* of petitioner's purported default." *Lambright v. Stewart,* 241 F.3d 1201, 1203 (9th Cir. 2001) (citations omitted) (emphasis added). A state rule is considered consistently applied and well-established if the state courts follow it in the "vast majority of cases."

See Dugger v. Adams, 489 U.S. 401, 411 n. 6 (1989). We find the State has not met its burden to prove the rule cited and relied upon by the Arizona post-conviction court–Arizona Rule of Criminal Procedure 32.6(d)–was clear, consistently applied, and well-established at the time the post-conviction court applied it to Scott's case.

The basis for the state court's order denying Scott's motions to vacate the denial of the first petition and allow the filing of an amended petition raising new grounds for relief was as follows:

> There is little doubt that this Court is Authorized [sic], upon a showing of good cause, to permit a defendant to amend a petition for post-conviction relief *before* a dispositive order issues. *See* Rule 32.6(d), A.R.Crim. P. Here, however, Defendant seeks an order vacating this Court's order dismissing his Petition for Post-Conviction Relief.... To grant the relief requested by Defendant would be contrary to the underlying purpose of Rule 32 and inconsistent with its procedures.

[3] This language implies the court thought that, regardless whether Scott had shown good cause to excuse his failure to plead all his claims in his first petition for post-conviction relief, the court simply did not have authority to allow amendment to the petition because it was amended after the court had already denied his first petition. This conclusion is contrary to the plain language of Rule 32.6(d), which at the time of Scott's post-conviction proceeding read:

> After the filing of a post-conviction relief petition, no amendments shall be permitted *except by leave of court upon a showing of good cause.*

Ariz. R. Crim. P. 32.6(d) (1996) (emphasis added). The only condition to amendment of a filed petition is the existence of good cause. Whether a court has or has not ruled on the original petition is not mentioned as a condition to amendment.

[4] The post-conviction relief judge conducted no analysis as to whether Scott had shown good cause to amend his petition. Rather, it appears the judge relied on an earlier version of Rule 32.6(d), which prohibited a post-conviction court from allowing the filing of an amended petition after the first petition had been dismissed. Before 1992, Rule 32.6(d) read, "Amendments to pleadings shall be liberally allowed at all stages of the proceeding *prior to entry of judgment.*" Ariz. R. Crim. P. 32.6(d) (1991) (emphasis added).[6] The emphasized language from this prior version of the rule, restricting amendments to the time period "prior to entry of judgment," was deleted by the legislature in 1992. Scott filed his proposed amendment in 1996.

The Arizona courts have not consistently interpreted the 1996 version of Rule 32.6(d) to prohibit amended or supplemental petitions for post-conviction relief when such amendments or supplements are filed after the denial of the first petition. To the contrary, before the post-conviction court's ruling in this case but after Rule 32.6(d) was amended in 1992, the Arizona Court of Appeals ruled in 1995 that a post-conviction court *has* the authority to allow the filing of an amended petition upon a showing of good cause, even if the court has already dismissed the original petition. *See Rodriguez,* 903 P.2d at 640-41 (holding that good cause was shown under Rule 32.6 where a petitioner sought to file a petition pro se *after* the post-conviction court dismissed his first petition because his post-conviction counsel failed to file the necessary brief explaining is claims in a timely manner). Thus, *Rodriguez,* the only published case that had interpreted Rule 32.6(d) after the 1992 amendment but before Scott's proceeding in 1996, was contrary to the post-conviction court's ruling in this case.[7]

---

[6] Arizona courts continue to construe Rule 32.6(d) as liberally allowing amendments, even though this language was also deleted in the 1992 revisions. *See Canion v. Cole,* 115 P.3d 1261, 1264 (Ariz. 2005) (holding "Rule 32.6(d), which permits a defendant to amend his petition 'upon a showing of good cause,' adopts a liberal policy toward amendment of [post-conviction relief] pleadings.").

The *Rodriguez* case shows the post-conviction court did not rely on a rule of state procedure that is regularly followed or "consistently applied" by the Arizona state courts. As this court has held, "federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce." *Siripongs v. Calderon,* 35 F.3d 1308, 1318 (9th Cir. 1994).

---

[7] Because the relevant inquiry is whether the rule was well-established or consistently applied "at the time of [the] alleged default to bar federal review," cases decided after the purported procedural default normally should normally not be considered. *See Lambright,* 241 F.3d at 1203, n. 2. Nevertheless, we note that after Scott's trial, the Arizona Supreme Court followed the reasoning of *Rodriguez* and issued orders allowing defendants upon a showing of good cause to file amended or supplemental petitions after their first petitions had been denied. *See Arizona v. Stokley,* No. CV-97-0203-SA (1999); *Arizona v. Kayer,* No. CR-94-0694 (1998).

[5] Thus, given that neither the text of the 1992 version of Rule 32.6(d) nor any case construing that version of the rule state that a post-conviction court cannot grant a motion to amend the petition after the original petition has been dismissed, the state has not met its burden of proving Rule 32.6(d) is consistently interpreted as it was interpreted here. Accordingly, the district court erred in holding that Rule 32.6(d) constitutes an adequate and independent state procedural bar to federal review on the merits and failing to rule on the merits of the proposed claims.

2. *Exhaustion*

[6] The district court held Scott did not exhaust his claims of ineffective assistance of counsel because he failed to present those claims to the Arizona courts. A federal court may not grant habeas relief to a state prisoner unless the prisoner has first exhausted his state court remedies. *See* 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by fully and fairly presenting each claim to the highest state court. *See Insyxiengmay,* 403 F.3d at 668. A petitioner fully and fairly presents a claim to the state courts if he presents the claim (1) to the correct forum, *see*

§ 2254(c); (2) through the proper vehicle, *see Castille v. Peoples,* 489 U.S. 346, 351 (1989); and (3) by providing the factual and legal basis for the claim, *see Weaver v. Thompson,* 197 F.3d 359, 364 (9th Cir.1999). Full and fair presentation additionally requires a petitioner to present the substance of his claim to the state courts, including a reference to a federal constitutional guarantee and a statement of facts that entitle the petitioner to relief. *See Picard v. Connor,* 404 U.S. 270, 278, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

Scott included his ineffective assistance of counsel claims in the appendix of his petition for review to the Arizona Supreme Court. He explicitly referenced his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. He also stated the operative facts on which each of the claims were based and cited federal case law to support his arguments. The only issue the state contests is whether including the claims in an appendix in a petition for review to the Arizona Supreme Court satisfied the fair presentation requirement for purposes of exhaustion. This is an issue of federal law, not state law. We hold Scott did accomplish a full and fair presentation of his claims to the Arizona Supreme Court. Scott included a copy of the amended petition for post-conviction relief he sought to file in the post-conviction court in the Appendix to his petition for review filed with the Arizona Supreme Court.

[7] This case is indistinguishable from *Insyxiengmay,* which held that presentation of an issue

in an appendix is sufficient to present the issue in a full and fair manner to the state courts.[8] *See Insyxiengmay,* 403 F.3d at 668. Indeed, it is questionable whether the claims even needed to be presented in the appendix to preserve them. As the *Insyxiengmay* court noted,

> [W]e question whether in order to exhaust the three claims it was even necessary for Insyxiengmay to file an appendix with the Washington Supreme Court.... Because in his motion Insyxiengmay asked the Washington Supreme Court to allow the claims to proceed in the court of appeals, and the court declined the request, thus barring him from presenting the claims for review either to the court of appeals or the supreme court, any further duty to exhaust was excused.

Insyxiengmay, 403 F.3d at 669 n. 5.

Similarly, Scott petitioned the Arizona Supreme Court to allow his claims to proceed in the post-conviction court and he gave the court a copy of the amended petition he sought to file, which included the operative facts and law. Thus, the Arizona Supreme Court knew exactly which claims Scott sought to present. The Arizona Supreme Court denied the request, "thus barring him from presenting the claims for review either to the [post-conviction court] or the supreme court." *See id.* Therefore, any further duty

---

[8] The State argues *Insyxiengmay* is distinguishable because the decision is based on Washington law but neither Arizona case law nor statutes hold that issues are waived in post-conviction proceedings if they are raised only in an appendix to a petition for review.

Scott had to exhaust was excused.

[8] All exhaustion requires is that the state courts have the opportunity to remedy an error, not that they actually took advantage of the opportunity. *See Picard v. Connor,* 404 U.S. 270, 275 (1971). Accordingly, Scott exhausted his state remedies with respect to the claims he sought to bring in his amended petition for post-conviction relief.

[9] We thus conclude Scott's claims are not procedurally barred from federal review.

3. Proceedings on Remand

[10] "Where a petitioner raises a colorable claim [to relief], and where there has not been a state or federal hearing on this claim, we must remand to the district court for an evidentiary hearing." *Phillips v. Woodford,* 267 F.3d 966, 973 (9th Cir. 2001) (quoting *Smith v. McCormick,* 914 F.2d 1153, 1170 (9th Cir. 1990)).

[11] The most serious claim Scott brings is ineffective assistance of counsel for failure to present mitigating evidence of his mental deficiencies at his sentencing hearing. The record reflects Steinle, the State, and the trial judge all knew Scott claimed he had "brain shrinkage" caused by several traumatic brain injuries, including a bicycle accident in seventh grade with a car, two motorcycle accidents, and a car accident, all of which had rendered Scott temporarily unconscious. In fact, Steinle had used Scott's claim of brain shrinkage as grounds for requesting a pre-trial competency evaluation ordered by the court. There is

no evidence, however, Steinle independently investigated these claims to present them as mitigating evidence in the penalty phase of the trial.

In *Summerlin v. Schriro*, 427 F.3d 623, 631 (9th Cir. 2005), this court granted an Arizona state petitioner's habeas petition. Summerlin's attorney never investigated or developed evidence of Summerlin's mental health history for presentation at the penalty phase of his capital trial, even though counsel knew he had been diagnosed with paranoid schizophrenia and treated with anti-psychotic medication. In *Summerlin*, as here, "[t]he strong psychiatric evidence of Summerlin's lack of impulse and emotional control and *organic brain dysfunction* could have provided significant mitigating evidence." *Id.* at 641 (emphasis added).

As indicated by the 2006 report ordered by Scott's federal habeas attorneys, investigation would have revealed a computer tomography ("CT") scan demonstrating Scott had organic brain damage. Scott's organic brain injury is also described in a psychiatric evaluation ordered by his federal habeas attorneys in 1996. The report states a CT scan performed in 1987 showed the presence of brain atrophy unusual for a person of Scott's age at the time, and Dr. Don, the psychiatrist, linked this brain damage to a likelihood that Scott was more easily influenced by Styers than would have been a normal person.

[12] Additionally, for several years Scott was a severe alcoholic, drinking two fifths of whiskey every day–which may also have contributed to cognitive

problems. The trial court refused to consider Scott's alcoholism as a mitigating factor because it was a voluntary act. This is contrary to Arizona law. "Voluntary intoxication or substance abuse can be a mitigating factor.... Intelligence also has been considered as part of determining whether a head injury caused damage sufficient to warrant consideration as a mitigating factor." *State v. Kayer,* 984 P.2d 31, 45, 47 (Ariz. 1999) (citing *State v. Stokley,* 898 P.2d 454, 469 (1995)). Certainly Scott's traumatic head injuries should have been, at the very least, investigated by Steinle in preparation for the presentation of Scott's penalty-phase case by ordering the same hospital records relied upon by the 2006 report. Such an omission by Steinle is striking.

It is also clear from the record that the State made a plea offer to Scott before trial. According to Steinle's affidavit, "[t]he state of Arizona indicated that if Mr. Scott agreed to testify and was truthful in his testimony he could plead guilty to second-degree murder." However, according to Steinle's affidavit, Steinle rejected the offer because Scott would not read it, despite the fact Scott wanted to accept the offer. Regardless of the propriety of rejecting the plea offer on this basis (which is highly suspect), evidence of the plea offer could have been introduced during the sentencing phase as mitigation. *See Summerlin,* 427 F.3d at 640 (holding that evidence the prosecution offered to allow the defendant to plead guilty to second-degree murder and aggravated assault was mitigating evidence that could be admitted in the sentencing phase after the defendant had been found guilty of first-degree murder). The plea offer's mitigatory effect is clear: the prosecution thought this was not a clear-cut death penalty case. *Summerlin,* 427 F.3d at 631.

No court has weighed all of the mitigating evidence found by the trial court as well as the additional factor-lack of prior felony convictions-found by the Arizona Supreme Court against the aggravating factors found at trial. In addition, Scott raised a further claim before the Arizona Supreme Court and the district court-that his appellate attorney rendered ineffective assistance of counsel because he did not challenge the jury's finding that he committed the crime for pecuniary gain. If this claim is found to have merit, it will mean there is one less aggravating factor to weigh in the equation. Thus, it is possible that had Scott's counsel presented this additional evidence during sentencing, Scott might have received the lesser sentence of life without the possibility of parole. We remand to the district court to make that determination.

[13] Because Scott was never given a hearing in the state court on his ineffective assistance of counsel claims, he is entitled to a hearing in district court. *Phillips,* 267 F.3d at 973. On remand, the district court should hold an evidentiary hearing to allow both parties to put on evidence regarding each of Scott's claims of ineffective assistance of counsel.

On remand, the district court should decide these issues *de novo* after an evidentiary hearing because there is no state court determination on the merits to which the district court can defer. *See Pirtle v. Morgan,* 313 F.3d 1160, 1167-68 & n. 4 (9th Cir. 2002) (holding that where "there is no state court decision on this issue to which to accord deference ... concerns about comity and federalism that arise when a state court reaches the merits of a petition for post-conviction relief do not exist [and] when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo.").

B. Victim's Father's Leniency Recommendation

Scott raises one claim that was decided on the merits in both the state court and the federal district court: whether Steinle's failure to present the victim's father's recommendation Scott be given leniency at sentencing constituted ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution.

[14] A criminal defendant is entitled to relief for ineffective assistance of counsel when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. 668, 686 (1984). To establish ineffective assistance, the defendant must show (1) counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and (2) this deficient performance prejudiced the defense. *Id.* at 687. To demonstrate prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In an appeal of a death sentence,

it is not enough that the error may have affected the outcome; the question is whether, "absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. The ultimate inquiry "must be on the fundamental fairness of the proceedings whose result is being challenged." *Id.* at 696.

Because Scott filed his federal petition for writ of habeas corpus on July 25.1997, the merits of his claim are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell v. Cone,* 535 U.S. 685, 699 (2002). Rather, a federal court may grant habeas relief only when the state court's adjudication on the merits resulted in a decision that was "contrary to, or involved an unreasonable application of," *Strickland* or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2).

[15] We cannot perceive any strategic reason for Steinle's decision not to investigate or introduce any evidence that the victim's father, Mark Milke, recommended Scott not be given the death penalty. *See Correll v. Ryan,* 539 F.3d 938, 949 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all."). Indeed, in an affidavit from Steinle filed during post-conviction proceedings, he does not even mention investigating Milke's recommendation that Scott be shown mercy. Nowhere

in the record does Steinle provide a rationale for his decision not to introduce independent evidence of Milke's leniency recommendation.

[16] Because Steinle had a duty to investigate and present *all* reasonable mitigating evidence, his performance was not reasonable "under prevailing professional norms." *See Wiggins v. Smith,* 539 U.S. 510, 521 (2003); *Strickland,* 466 U.S. at 688.

It is not reasonably probable, however, that Milke's leniency recommendation would have changed Scott's sentence from death to life in prison. Milke's leniency recommendation is a non-statutory mitigating factor. *See* Ariz. Rev. Stat. § 13-703(g). As the Arizona Supreme Court has recognized, "[B]ecause a trial court has discretion in determining how much weight to give each mitigating circumstance, non-statutory mitigating circumstances might not be entitled to much weight either individually or cumulatively." *Gallegos,* 870 P.2d at 1119.

Here, . the Arizona post-conviction judge who determined this error was harmless was the same judge who sentenced Scott. We know that at some point prior to imposing sentence this judge considered and rejected the victim's father's recommendation for leniency as he had read the pre-sentence report, which contained a leniency recommendation by Mark Milke. The judge must have determined the leniency recommendation did not carry much weight in light of the aggravating factors.

[17] Ultimately, pursuant to AEDPA, we must give deference to a state court's decision unless it is objectively unreasonable. *See* 28 U.S.C. § 2254(d)(1); *Bell,* 535 U.S. at 692. Because it is not reasonably probable that Scott's sentence would have changed had the leniency recommendation been introduced by itself as mitigating evidence, the Arizona post-conviction court's determination Scott suffered no prejudice was neither "contrary to" nor did it "involve an unreasonable application of" *Strickland.* 28 U.S.C. § 2254(d)(1). Thus, this claim does not entitle Scott to habeas relief.

[18] However, this does not put the issue to rest. Among the three ineffective assistance of counsel claims the district court will consider on remand is that trial counsel was constitutionally ineffective because he did not investigate and present mitigating evidence during the sentencing phase of Scott's trial. Thus, although the failure to present Milke's recommendation for leniency does not, by itself, establish prejudice, this failure should be re-evaluated by the district court in light of the other mitigating evidence counsel failed to present.

III. Conclusion

With respect to the following ineffective assistance of counsel claims, we reverse the district court's determination because the claims are not procedurally defaulted and were exhausted: (1) that trial counsel rendered ineffective assistance of counsel because he failed to challenge the voluntariness of Scott's statements to the police; (2) that trial counsel rendered ineffective assistance of counsel because he did not investigate and present mitigating evidence of Scott's traumatic brain injuries and their effect on his mental processes during the sentencing phase; and (3) that appellate counsel rendered ineffective assistance of counsel because he failed to challenge the trial court's finding Scott committed the crime for pecuniary gain. We remand those claims to the district court for a resolution on the merits in the first instance. We affirm the district court's denial on the merits of Scott's claim that his trial counsel was constitutionally ineffective for not presenting a recommendation for leniency from the victim's father as mitigation evidence. Nevertheless, the district court should reconsider whether this failure prejudiced Scott in light of the other factors the district court considers on remand.

Appellant is awarded costs.[9]

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

---

[9] Appellee's motion to file a supplemental brief is granted. The Clerk shall file the brief received on August 1, 2008.

APPENDIX B

Supreme Court
STATE OF ARIZONA

NOEL K. DESSAINT — CLERK OF COURT
KATHLEEN E. KEMPLEY — CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

October 20, 1997

AMENDED

RE: STATE OF ARIZONA vs. ROGER MARK SCOTT
Supreme Court No. CR-97-0179-PC
Maricopa County No. CR 89-12631

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 24, 1997, in regard to the above-referenced cause:

ORDERED: Amended Petition for Review (from denial of Post Conviction Relief) = DENIED.

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Arizona Attorney General
Paul J. McMurdie, Esq., and Randall M. Howe, Esq.

Rachel L. Yosha, Esq.
Hon. David R. Cole, Judge, Maricopa County Superior Court
Hon. Ronald S. Reinstein, Presiding Criminal Judge, Maricopa County Superior Court
Judith Allen, Clerk, Maricopa County Superior Court
Roger Mark Scott, DOC #85024-CB6, Arizona State Prison-Florence
Jennifer Might, Administrator, Arizona Capital Representation Project

rs

APPENDIX C

FILED
DEC 21 1993
NOEL K. DESSAINT
CLERK SUPREME COURT
BY s/________________

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, v. ROGER MARK SCOTT, Appellant.	Supreme Court No. CR-91-0124-AP Maricopa County No. CR 89-12631 OPINION

Appeal from the Superior Court of Maricopa County

The Honorable David R. Cole, Judge

AFFIRMED

Grant Woods, Attorney General Phoenix
By Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
Randall M. Howe, Assistant Attorney General
Attorneys for Appellee

John W. Rood, III Phoenix
Attorney for Appellee

MOELLER, Vice Chief Justice

STATEMENT OF THE CASE

A jury found Roger Mark Scott (defendant) guilty of first degree murder, conspiracy to commit first degree murder, and kidnapping, a dangerous crime against children. Defendant was sentenced to death on the murder count and to terms of imprisonment on the other counts. Appeal to this court is automatic on the death sentence, see Ariz. R. Crim. P. 31.2(b), and defendant appealed the other convictions and sentences. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13-4031, 13-4033, 13-4035. Scott's co-defendants, Debra Milke and James Styers, were convicted in separate trials and have also appealed. The three cases were consolidated for oral argument, but we resolve them by separate opinion.

FACTS

Because defendant challenges both the sufficiency of the evidence and the voluntariness of his statements to police, we set forth the facts in detail. Co-defendant Milke and her four-year-old son, Christopher, shared an apartment with co-defendant Styers and his two-year-old daughter. While Milke worked at an insurance agency, Styers, who was unemployed, watched the children. Defendant and Styers have been friends for over 20 years. At the time of the murder, defendant was 41 years old, unemployed, and living with his mother. He did odd jobs for spending money and took care of his elderly and ill mother.

About a week before the murder, Styers told defendant that he and Milke planned to kill Christopher, and Styers asked defendant if he would help. Milke told defendant twice in the week before the murder that she wanted her son killed. She said that she had to get away from the child, that she wasn't cut out to be a mother, and that she wanted Styers and defendant to take care of it. Milke had a $5000 life insurance policy on her son as part of her employee benefits package. Styers and Milke offered to pay defendant $250 from the insurance proceeds if he would drive the car. Defendant told police that he and Styers had attempted to kill Christopher at least once in the week before the murder.

On the day of the murder, around 11:00 a.m., Saturday, December 2, 1989, Styers, who had Christopher with him, picked up defendant at defendant's residence. Christopher wanted to see Santa Claus and Styers told Christopher that they were going to Metrocenter to see Santa. The three stopped at two drugstores so defendant could pick up a prescription and a Christmas gift; they also had lunch. Styers began driving out to the desert, and then pulled over so defendant could take over driving. Styers told defendant where to stop; the two men and Christopher got out of the car. Christopher was told they were going to look for snakes. The three walked into the wash about 50 feet. At some point, Styers told defendant that he was going to leave the body close to the road so it would be found in a few days. Styers told defendant to get in the car and drive north a little ways, turn around, and meet him on the road south of the wash.

Defendant drove north, turned around, and came back to the wash. Hearing nothing, he kept driving because there was traffic behind him. After making several passes by the wash, defendant pulled over and got out of the car. He did not see anybody, nor did he hear anything. He told police he thought Styers had decided not to go through with the plan, but then he heard three shots. Defendant got in the car, and then Styers came out to the road and got in the car. Styers said something to the effect of "that's done, get out of here." As defendant drove east on Union Hills, Styers tossed the shells from the gun out the window between 99th and 83rd Avenues.

Defendant drove to Metrocenter, a shopping mall, and parked outside of the Sears store. Styers had placed the gun in the glove compartment and told defendant to retrieve it later. The two men went into Metrocenter and, as planned, separated to make it look like they had not come together. Styers then told mall security that he had come to Metrocenter with Christopher to see Santa Clause and had stopped in Sears to use the restroom. Styers told security that while he was in the bathroom stall, Christopher disappeared. Metrocenter security searched unsuccessfully, and then called the police.

About 3:20 p.m. that afternoon, Styers and a Sears employee who had been helping him look for Christopher approached defendant in Metrocenter, and Styers asked defendant if he had seen Christopher. Defendant said he had not, and told Styers that he came to Metrocenter with an old friend from high school named Phil. Defendant later told police that this statement was made to distance themselves from each other and make it look like they had not come together.

Styers and defendant then walked to the parking lot. In the parking lot Styers gave defendant the gun and a pair of black Nike tennis shoes. The shoes were worn by Styers in the wash, and he wanted defendant to throw them in the dumpster and take the gun. Defendant threw the shoes in a planter in the parking lot, got on a bus around 4:20, and went home. The gun was later found in his closet in a box—exactly where defendant told police it would be.

In the meantime, Styers remained at Metrocenter with the police. Not until about 12:30 a.m. on Sunday did Styers mention to police that he had been with his friend, the defendant, earlier that day. Styers told police that they had gone to some drugstores, ate pizza, and then he and Christopher had dropped defendant off near defendant's residence. Styers said he also saw defendant later at Metrocenter, but that defendant told him he came with someone named Phil.

At that point, the police and Styers went to defendant's home. Defendant told the officer the same story; that Styers had dropped him off and he had walked to a Circle K where he ran into Phil, an old acquaintance from high school. Phil wanted to buy some tools, so they went to Metrocenter. At Metrocenter, defendant and Phil became separated. While he was looking for Phil, defendant ran into Styers and the Sears employee. Defendant said that was the first he had heard that Christopher was missing. The police came back to defendant's home a few hours later, and asked him to come down to the station to give a more detailed statement. Defendant voluntarily went to the station.

At the station, he gave a statement to Officer Jones. In this statement he gave the story we have just recited. Several hours later, Detective Mills interviewed defendant who continued to relate the same story. At about 12:45 p.m. on Sunday, December 3, Detective Saldate began interviewing defendant. Saldate told defendant he didn't believe the Phil story and read defendant his Miranda rights.[1] A few hours later, defendant told Saldate that the Phil story was a lie. Eventually, he admitted that he knew where Christopher's body was. That evening, defendant led police to the body, showed them where Styers threw the shells, and where he had left the tennis shoes. Defendant gave Detective Mills a detailed tape-recorded statement at 8:00 p.m. that night. Defendant, Styers, and Milke were arrested for the murder of Christopher.

ISSUES

1. Whether defendant's statements to the police on December 3, 1989 were voluntary.

2. Whether the trial court violated defendant's constitutional rights by its voir dire of the jury panel

---

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

regarding the death penalty.

3. Whether the trial court erred by denying defendant's motion for judgment of acquittal of felony murder.

4. Whether the trial court erred by failing to give separate jury verdict forms for felony murder and premeditated murder.

5. Whether the trial court erred by failing to instruct the jury on facilitation as a lesser included offense of first degree murder.

6. Whether the trial court erred by not granting defendant's motion to dismiss the aggravation/mitigation hearing and to impose a sentence other than death.

7. Whether Arizona's death penalty statute is unconstitutional because:

a. the jury does not determine the existence of aggravating factors; or

b. the statute fails to adequately channel the sentencer's discretion; or

c. death by lethal gas constitutes cruel and unusual punishment.

8. Whether the death penalty was properly imposed in this case. Specifically:

a. Whether there was compliance with the Enmund/Tison standard of death eligibility.

b. Whether the state established beyond a reasonable doubt that the murder was committed in expectation of pecuniary gain.

c. Whether the murder was committed in an especially heinous and depraved manner.

d. Whether the trial court improperly weighed the victim's age twice in balancing aggravating and mitigating factors.

e. Whether the trial court properly considered the nonstatutory mitigating evidence proffered by defendant.

DISCUSSION

1. Voluntariness of Statements to Police

Defendant challenges the voluntariness of his statements to Detectives Saldate and Mills. Following a voluntariness hearing, the trial court found the statements were voluntary. Furthermore, it found no violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Defendant contends that he was in custody prior to the time he was read his Miranda rights, and the confession made after the Miranda warnings was the result of improper and coercive police conduct consisting of the deprivation of food, sleep, and medication and Detective Saldate's statement that the police would be sent to question defendant's mother. The state argues that he was not in custody until he made incriminating statements to Saldate; therefore, he was never deprived of any items because he was always free to obtain the items himself. Furthermore, the state argues any claimed deprivation of sleep, food, or medication did not affect the voluntariness of the statements, and Saldate's statement that he would send police to speak with defendant's mother was not improper, nor did it induce the confession.

Because the only statements challenged were made after defendant was given his Miranda warnings, we focus only upon the separate voluntariness issue. See State v. Stanley, 167 Ariz. 519, 523, 809 P.2d 944, 948, cert. denied, ____ U.S. ___, 112 S. Ct. 660 (1991) (Miranda and voluntariness are two separate issues); State v. Tapia, 159 Ariz. 284, 286, 767 P.2d 5, 7 (1988) same).

Confessions are presumed to be involuntary, and the state has the burden of proving by a preponderance of the evidence that the confession was voluntary. State v. Amaya-Ruiz, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990), cert. denied, ___ U.S. ___, 111 S. Ct. 2044 (1991). Absent clear and manifest error, the trial court's ruling will not be disturbed on appeal. State v. Rivera, 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987). In reviewing the trial court's ruling, we consider the totality of the circumstances. Stanley, 167 Ariz. at 524, 809 P.2d at 949. In determining the confession was voluntary, the critical inquiry "is whether police conduct constituted overreaching." Id. See also

Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 522 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."). The "police misconduct [must be] causally related to the confession." Stanley, 167 Ariz. at 524, 809 P.2d at 949 (citing Colorado v. Connelly, 479 U.S. at 164, 107 S. Ct. at 520).

When police officers arrived at defendant's residence at 2:15 a.m., defendant voluntarily agreed to accompany them to the police station. He was transported in an unmarked and uncaged police car, and was not handcuffed. The officer who took defendant's first statement at the station, in which he related the "Phil" story, testified that, at that point, defendant was free to leave and was not considered a suspect. The police, however, did not tell defendant that he was not under arrest. Cf. Stanley, 167 Ariz. at 523, 809 P.2d at 948 (defendant expressly told that he was not under arrest). At 4:18 a.m. defendant gave a taped statement in which he again told the "Phil" story. At 11:00 a.m., after defendant had been with the police for several hours, Detective Mills interviewed him. Mills testified that defendant did not appear "overly tired," and that he was alert and aware of the situation. Mills was aware that defendant was taking prescription medication; however, defendant never requested any medication.

Nothing suggests that any lack of medication had an adverse effect on defendant. In fact, the taped statement indicates that defendant received his medication that afternoon, though Detective Mills did not remember him taking it. Throughout the investigation, defendant was provided with soft drinks and cigarettes upon request; thus, it is reasonable to assume that had defendant asked to sleep, eat, or take his medication, the police would have responded similarly and provided these things. Detective Mills bought both himself and defendant dinner before defendant made the taped confession. Indeed, in his taped confession, defendant stated that the police had "[b]een pretty nice" to him. There is no indication that the police should have known, in the absence of a request, that defendant was in need of anything. Despite the fact that defendant had been at the police station for nearly 14 hours before he made any incriminating statements, there is no evidence to suggest overreaching or misconduct by the police. See State v. Linden, 136 Ariz. 129, 134, 664 P.2d 673, 678 (App. 1983) (length of time is but one factor to be considered).

The trial court obviously found that Saldate's statement did not coerce defendant's confession. The record reflects no improper motivation. Saldate took over the interview at 12:50 p.m. At 3:35 p.m. defendant confessed to Saldate. During that time, Saldate and defendant discussed several subjects, including the fact that defendant lived with and cared for his elderly mother. Defendant admitted that he made up the "Phil" story, the story that he was at Metrocenter with Styers and Christopher, and the story that Christopher disappeared at the mall. Saldate told defendant he thought defendant knew something about the disappearance and he wanted the truth. Defendant claims he confessed only after Saldate threatened to send police to his mother's house because he felt that would be too much for his elderly mother to handle.

The trial court was justified in finding that Saldate used no improper influence. Saldate did nothing improper when he suggested that police would be sent to defendant's residence to talk to his mother. Relevant factors in determining whether comments about a suspect's relatives constitute overreaching include "whether a defendant has agreed to answer questions following Miranda warnings, . . . whether the defendant rather than police initiate the discussion concerning the relative, . . . and whether the authorities are honest with the accused." State v. Ferguson, 119 Ariz. 55, 60, 579 P.2d 559, 564 (1978). Defendant waived his Miranda rights and answered questions for two hours before Saldate mentioned sending police to speak to defendant's mother. Saldate was being honest with defendant when he said that police would verify his story by questioning his mother. Furthermore, there was no promise that police would not speak to defendant's mother if he confessed.

We cannot say that defendant's statements were the result of anything but his own compulsion to tell the truth. See Amaya-Ruiz, 166 Ariz. at 166, 800 P.2d at 1274. We also affirm the trial court's finding that defendant voluntarily and knowingly waived his Miranda rights when read by Saldate, and later by Mills. Police did not threaten or intimidate defendant into waiving his rights. In fact, he had been volunteering the "Phil" story for several hours and continued with the story for two hours after he was given his Miranda warnings. There is also no evidence that defendant exhibited "objective signs of distress, confusion, or incomprehension," before he was read his Miranda rights. See Tapia, 159 Ariz. at 289, 767 P.2d at 10. Defendant answered questions freely and did not ask for an attorney or attempt to terminate the interview. See Rivera, 152 Ariz. at 513, 733 P.2d at 1096. The trial court's finding of voluntariness is fully supported by the record.

2. Voir Dire of Jury Panel Regarding Death Penalty

Defendant contends that asking prospective jurors about their views on the death penalty violated his constitutional rights to due process of law and to a fair and impartial jury. See Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968); United States Const., Sixth and Fourteenth Amendments; Ariz. Const. art. 2, §§ 4, 24. Defendant also contends that questions regarding the death penalty constitute a religious test in violation of article 2, section 12 of the Arizona Constitution. Defendant contends the trial court violated the state constitution by asking the questions and by excusing venireman "S." for expressing a personal view against the death penalty.

Questioning potential jurors regarding their views on the death penalty to determine whether they have a bias regarding the death penalty that would prevent them from performing their duties is a practice that has been repeatedly upheld by this court. See, e.g., State v. Schaaf, 169 Ariz. 323, 331, 819 P.2d 909, 917 (1991); State v. White, 168 Ariz. 500, 509, 815 P.2d

869, 878 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1199 (1992); State v. Martinez-Villareal, 145 Ariz. 441, 449, 702 P.2d 670, 678, cert. denied, 474 U.S. 975, 106 S. Ct. 339 (1985). The trial court properly asked questions that related to the jurors' ability to be fair and impartial.

Article 2, section 12 of the Arizona Constitution provides that no venireman shall be judged incompetent based on "his opinion on matters of religion." In State v. Fisher, 141 Ariz. 227, 249, 686 P.2d 750,772, cert. denied, 469 U.S. 1066, 105 S. Ct. 548 (1984), we held that article 2, section 12 "does not say an individual will be qualified as a juror despite his religious beliefs if those beliefs prevent him from being fair and impartial in a given case." If a person's religious beliefs impinge upon his or her ability to be fair and impartial, then that person may be disqualified.

S. was opposed to the death penalty for "personal reasons." Nothing in the record indicates that these reasons were necessarily based on religion. S. was very forthright in answering the judge's questions and admitted that she would not be able to decide a case involving a potential death sentence fairly and impartially. Thus, we find no error.

3. Motion for Judgment of Acquittal of Felony Murder

Defendant contends that the trial court erroneously denied his motion for directed verdict on felony murder. The thrust of his argument is that there was insufficient evidence of kidnapping to support the predicate felony for felony murder. Specifically, defendant argues that there is no substantial evidence that he restrained Christopher with the intent to kill. "A motion for acquittal made at the close of the prosecution's case is tested on the sufficiency of the evidence at that point." State v. Mathers, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). We will affirm the trial court's denial of a motion for acquittal if there is substantial evidence to support the guilty verdict. State v. Guerra, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989), "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" Mathers, 165 Ariz. at 67, 796 P.2d at 869, (quoting State v. Jones, 125 Ariz. 417, 419, 610 P2d 51, 53 (1980)). Upon review, we consider the evidence "in the light most favorable to sustaining the verdict." State v. Arredondo, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

Defendant was charged with felony murder based on the predicate offense of kidnapping. Therefore, the state was required to prove that defendant or another person caused the death of Christopher Milke "in the course of and in furtherance of . . . or immediate flight" from committing or attempting to commit kidnapping. A.R.S. § 13-1105(A). To prove kidnapping, the state had to prove that defendant knowingly restricted the child's movements with the intent to kill or physically injure the child. See A.R.S. § 13-1304(A). The jury was also instructed that the restriction must be accomplished "by intimidation or deception; and . . . in a manner which interfered substantially with the child's movements; and by moving the child from place to place."[2]

Styers took Christopher from his apartment to defendant's place; then he and defendant took Christopher from the drug store and pizza place to the desert where he was killed. This constituted moving the victim from place to place. This was done by deception and in such a manner as to interfere substantially with Christopher's liberty. Styers persuaded Christopher to come with him by telling him that he was going to Metrocenter to see Santa Claus. He was led into the wash after being told that they were going to look for snakes, and he was even given binoculars to divert his attention. Naturally, as a four-year-old child, Christopher had no control over where he went or what happened and was totally dependant upon Styers and defendant who controlled the car.

---

[2] Section 13-1301(2) defines "restrain" as:

> restrict[ing] a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if accomplished by:
>
>> (a) [1] [p]hysical force, [2] intimidation or [3] deception; or (b) [4] [a]ny means including acquiescence of the victim if the victim is a child . . . and the victim's lawful custodian has not acquiesced in the movement or confinement.

Thus, there are four ways in which to establish lack of consent. In presenting its case to the jury, the state chose to limit itself to only two: intimidation and deception.

In its brief, the state argues that restraint was also shown by the fourth option: that there was acquiescence by Christopher, and that Debra Milke could not, by law, acquiesce in the taking of Christopher for the purpose of killing him. See State v. Viramontes, 163 Ariz. 334, 337, 788 P.2d 67, 70 (1990). Although the evidence would likely support this finding, we will analyze the evidence according to the instructions given to the jury. Therefore, the state was required to establish that the restraint was without consent because it was accomplished by intimidation or deception.

Defendant admitted that Styers and Milke had asked him to help then carry out their plan to kill Christopher. He told police that he knew why they were driving out to the desert that day. In fact, defendant and Styers had previously attempted to carry out the plan. Defendant did all this with the intent to kill or physically injure Christopher. Defendant knew Styers had the gun with him, and he knew Styers was going to kill Christopher in the wash.

Defendant was charged and the jury was instructed on accomplice liability theory, which makes no distinction between principals and accomplices. See A.R.S. § 13-301. There is substantial evidence upon which the jury could find defendant guilty as an accomplice. Defendant did nothing to stop Styers, despite his knowledge that Styers intended to kill Christopher in the wash that day. The evidence established clearly that defendant aided Styers and provided the means and opportunity for Styers to kill Christopher, and he did so with the intent to facilitate the murder of Christopher. See A.R.S. § 13-301. Thus, there is substantial evidence of kidnapping, and defendant was not entitled to a judgment of acquittal on the felony murder charge.

4. Verdict Form for First Degree Murder

Defense counsel requested the jury be given a verdict form for first degree murder that would allow the jury to indicate how many jurors found that the murder was premeditated, how many found that it was felony murder, and how many found that it was both. The trial court refused. Defendant acknowledges that previous cases have held that such verdict forms are not required, but asks that we reconsider this holding. See State v. Schad, 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989), aff'd, ___ U.S. ___, 111 S. Ct. 2491, 2504 (1991); State v. Smith, 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989); State v. Encinas 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982).

We again hold that it is not error to submit only one form, but we again suggest that, in appropriate cases, the trial court should consider doing so. See Schad, 163 Ariz. at 417, 788 P.2d at 1168; Smith, 160 Ariz. at 513, 774 P.2d at 817.

5. Lesser Included Offense of Facilitation

The trial court refused defendant's request that the jury be instructed on the elements of facilitation as a lesser included offense of first degree murder. See A.R.S. § 13-1004. Defendant claims that this was error.

In general, to constitute a lesser included offense, it must be impossible to have committed the greater offense without necessarily having committed the lesser offense. See State v. Gooch, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984); State v. Garcia, ___ Ariz. ___, ___ P.2d ___ (App. 1993); State v. Politte, 136 Ariz. 117, 121, 664 P.2d 661, 665 (App. 1982); State v. Harris, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982). In other words, "the [lesser] offense must be composed solely of some but not all of the elements of the greater crime or . . . ." State v. Celaya, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983).

First degree murder requires proof that the defendant either intentionally or knowingly caused the death of another with premeditation; or "[a]cting either alone or with one or more other persons . . . commits or attempts to commit . . . kidnapping . . ., and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person." A.R.S. § 13-1105(A). the facilitation statute provides:

> [a] person . . . commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, such person knowingly provides such other person with means or opportunity for the commission of the offense and which in fact aids such person to commit the offense.

A.R.S. § 13-1004(A). Clearly it is possible to commit first degree murder without committing the offense of facilitation.

However, a crime may also be a lesser included offense if "the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the major offense charged." Gooch, 139 Ariz. at 366, 678 P.2d at 947 (emphasis added). In this case, defendant was charged with and the jury was instructed on, the accomplice liability theory.[3] An accomplice is defined as a person

---

[3] The indictment charged first degree murder as follows:

> DEBRA JEAN MILKE (A), JAMES LYNN STYERS (B), AND ROGER MARK SCOTT (C), on or about the 2nd day of December, 1989, intending or knowing that their conduct would cause death, with premeditation caused the death of CHRISTOPHER MILKE, a child, AND/OR DEBRA JEAN MILKE (A), JAMES LYNN STYERS (B), and ROGER MARK SCOTT (C), on or about the 2nd day of December, 1989, acting either alone or with one or more other persons committed or attempted to commit an offense, to-wit: . . . KIDNAPPING, PER A.R.S. § 13-1304, and in the course of and in furtherance of such offense or immediate flight from such offense, DEBRA JEAN MILKE (A), JAMES LYNN STYERS (B), AND ROGER MARK SCOTT (C), or another person caused the death of CHRISTOPHER MILKE, a child, in violation of A.R.S. §§ 13-1105, 13-1101, 13-703, 13-801, 13-203(A) and (B.2), 13-302, 13-303, 13-304 and 13-812.

(Continued)

> who with the intent to promote or facilitate the commission of an offense:
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense.
>
> 3. Provides means or opportunity to another person to commit the offense.

A.R.S. § 13-301. An accomplice is criminally liable for the conduct of the person who commits the substantive offense. A.R.S. § 13-303(A)(3). As the jury was instructed, "[t]he law makes no distinction between a person who directly commits a crime and the person who is an accomplice."

Defendant argues that when first degree murder is charged under the accomplice statutes, facilitation is then a lesser included offense. See Gooch, 139 Ariz. at 366, 678 P.2d at 947. The court of appeals recently addressed this issue in Garcia, ___ Ariz. at ___, ___

(Continued).

(Emphasis added.) We note that the other two counts against Scott also referred to the accomplice statutes, A.R.S. §§ 13-302, 13-303.

P.2d at ___. We agree with the court of appeals' opinion in Garcia.

In Garcia, the defendant was charged with aggravated assault under the accomplice statutes, A.R.S. § 13-301, 13-303(A)(3). Garcia argued that Gooch required an instruction on a lesser included offense if the lesser offense was "described" in the indictment. Garcia claimed that facilitation was a lesser included offense because the indictment "'described' the greater offense of aggravated assault in terms that entitled him to an instruction on facilitation." Garcia, ___ Ariz. at ___, ___ P.2d at ___.

Similarly, the indictment in this case refers only to the statutory provisions that impose accomplice liability. The facts contained in the indictment do not describe the lesser crime of facilitation. Even if facilitation might arguably be considered a lesser included offense of accomplice liability when the indictment "describes" the acts constituting accomplice liability, no such description appears in this indictment. Because the indictment in this case lacks such a description, we need not, and do not, decide whether another result might be reached under some other indictment. Defendant was not entitled to a facilitation instruction under this indictment and these facts. See Gooch, 139 Ariz. at 367, 678 P.2d at 948, but see E. Hardy Smith, Recent Decisions, 25 Ariz. Law. Rev. 1047, 1050-54, 1056-57 (1983) (taking the position that facilitation is a lesser included offense of the substantive offense when defendant is charged under the accomplice statutes). Defendant next argues that Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382 (1980), requires the trial court to give an instruction on facilitation as a lesser included offense of first degree murder. Defendant claims that, without the facilitation instruction, the jury was left with the choice of convicting him of capital murder or letting him go free, a result the Supreme Court found unacceptable in Spaziano v. Florida, 468 U.S 447, 454-57, 104 S. Ct. 3154, 3159-60 (1984). We disagree.

Beck does not entitle defendant to an instruction on a crime that is not a lesser included offense of the murder charge. See Spaziano, 468 U.S. at 455, 104 S. Ct. at 3159. As discussed above, facilitation is not a lesser included offense in this case. Therefore, Beck does not require the result defendant seeks.

6. Motion to Dismiss Aggravation/Mitigation Hearing

After the jury returned guilty verdicts, defense counsel filed a motion to dismiss the aggravation/mitigation hearing and to impose a sentence other than death because the state failed to notify him before trial of the specific aggravating factors it intended to prove. Defendant contends that the lack of notice before trial violated his due process rights. See United States Const. Fourteenth Amendment; Ariz. Const. art. 2, §§ 4, 24. Defendant contends that if he had received notice prior to trial that the state would seek to establish that the murder was committed in an especially heinous and depraved manner, he could have rebutted the evidence during the trial phase.

Defendant has no due process right to receive notice of aggravating factors prior to trial. In State v. Richmond, 136 Ariz. 312, 316, 666 P.2d 57, 61, cert. denied, 464 U.S. 986, 104 S. Ct. 435 (1983), we held:

> Due process requires that a defendant be advised of the specific charges against him. The information in this case gave appellant adequate notice of the charges. There is no requirement that a defendant be advised in the indictment or information of the statutory penalty, or that he be advised what aggravating circumstances will be presented at sentencing in the event of a conviction.

All defendant is entitled to prior to trial is notice of the specific charges against him.[4] The charges were contained in the indictment, which also put him on notice that the state would seek the death penalty because it cited A.R.S. § 13-703, Arizona's death penalty statute. Additionally, defendant knew prior to trial that the state intended to seek the death penalty because the state filed a Notice of Intent to Seek the Death Penalty on June 14, 1990—seven months prior to trial.

---

[4] Since defendant's trial, new rules of criminal procedure have been enacted providing that, in a capital case, the state must notify defendant of its intent to seek the death penalty not less than 30 days after arraignment. See Ariz. R. Crim. P. 15.1(g)(1). Additionally, the state must disclose within 10 days after a guilty verdict in a capital first degree murder case a list of aggravating circumstances it intends to prove, the witnesses and documents it intends to use to prove those factors, and any material or information that might mitigate an aggravating circumstance. See Ariz. R. Crim. P. 15.1(g)(2). Even under these new rules, there is no requirement of pretrial notice of the statutory aggravating circumstances upon which the state will rely.

Even before the recent rule amendment, see note 4 below, case law required the state to disclose the aggravating factors it would seek to prove, and the evidence upon which it would rely, and to make such disclosure "sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal." State v. Ortiz, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2259 (1982). The state complied with that case law requirement in this case. We find no constitutional violations based on lack of notice. Accord Ortiz, 131 Ariz. at 208, 639 P.2d at 1033.

7. Constitutionality of Death Penalty Statute

Defendant contends the Arizona death penalty procedure is unconstitutional because (1) the jury does not determine the existence of aggravating factors in capital cases; (2) the sentencing discretion is not adequately channeled; and (3) A.R.S. § 13-704, which mandates death by lethal gas, is cruel and unusual punishment in violation of the Eighth Amendment. The first two challenges to Arizona's death penalty statute were again addressed and again rejected in State v. Milke, ___ Ariz. ___, ___ P.2d ___ (1993).

Previous cases have also rejected the third contention concerning lethal gas. See State v. Williams, 166 Ariz. 132, 142, 800 P.2d 1240, 1250

(1987).[5]

8. Death Penalty Issues

a. Enmund/Tison

Defendant argues that his death sentence is unconstitutional because the state failed to show that he was death eligible under Enmund/Tison.[6] In Enmund v. Florida, the Supreme Court held that the death penalty was unconstitutional as applied to Enmund who did not himself kill, attempt to kill, or have any "intention of participating in or facilitating a murder." Enmund, 458 U.S. at 798, 102 S. Ct. at 3377. In determining the appropriateness of the death penalty, the focus must be on the individual defendant's culpability. Id. Tison v. Arizona held that the Enmund culpability requirement was also satisfied, in a felony murder case, by "major participation in the felony committed, combined with reckless indifference to human life." 481 U.S. at 158, 107 S. Ct. at 1688.

In this case, the jury found defendant guilty of conspiracy to commit first degree murder. It also found that the conspiracy was carried out. That, alone, satisfies Enmund. Additionally, the trial court found "that the evidence does not establish that Defendant fired the fatal shots. However, the evidence does establish, beyond a reasonable doubt, that Defendant intended to kill the victim." Additionally, in rejecting the claimed mitigating circumstance that the defendant was only a minor participant, see A.R.S. § 13-703(G)(3), the trial court stated that it would have to "virtually ignore the evidence" in order to find that defendant played a minor role in the murder.

---

[5] The legislature has recently amended the Arizona Constitution, art. 22, § 22, to provide for execution by lethal injection. Because defendant was sentenced prior to the effective date of this amendment, November 23, 1992, he has the option of death by lethal gas or lethal injection.

[6] Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676 (1987); Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982).

The Enmund/Tison culpability requirements were clearly satisfied in this case.

b. Pecuniary Gain

Defendant challenges the trial court's finding under § 13-703(F)(5) that he committed the murder in expectation of pecuniary gain. He argues that the only evidence of this factor is his own statement that he was offered $250 to drive the car. He contends that his statement was not corroborated by any independent evidence; therefore, the doctrine of corpus delicti prevents his statement from being used to establish pecuniary gain.

Defendant points to no authority in support of his contention that the corpus delicti doctrine is applicable at the sentencing phase; nor have we found any. The doctrine provides that before an uncorroborated confession is

> Admissible as evidence of a crime, the state must establish the corpus delicti by proving that

> a certain result has been produced and that someone is criminally responsible for that result. Only a reasonable inference of the corpus delicti need exist before a confession may be considered.

State v. Gillies, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983) (emphasis added), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775 (1985); see also State v. Daugherty, 173 Ariz. 548, 550-51, 845 P.2d 474, 476-77 (App. 1992). We hold that the doctrine of corpus delicti is inapplicable at the sentencing phase. The aggravating factor of pecuniary gain was, therefore, adequately shown by defendant's statement alone. No additional foundation was necessary before the statement could be received for purposes of proving pecuniary gain. See State v. Greenway, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991); Gillies, 135 Ariz. at 512, 662 P.2d at 1019 ("the receipt of money must be established as a cause of the murder, not a result").

c. Especially Heinous and Depraved

The trial court's special verdict meticulously detailed how it arrived at its finding that the murder was especially heinous and depraved:

> In State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983), the court noted that prior cases construing these terms (heinous and depraved) gave rise to five specific factors that lead to a finding that either or both terms apply; (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the

victim; (3) the mutilation of the victim; (4) the senselessness of the murder, and (5) the helplessness of the victim. 135 Ariz. at 51-53, 659 P.2d at 10-12. The list has not changed. State v. Stanley, [167 Ariz. 519, 809 P.2d 944] (1991). While there is nothing in the case law to suggest that the Arizona Supreme Court considers the list to be exhaustive, this Court is unwilling to look beyond these factors in an effort to determine whether this murder was committed in an especially heinous or depraved manner.

The State urges that, with the exception of the "mutilation" factor, all these factors are present. The Court finds that the evidence fails to establish either that Defendant relished the murder or that gratuitous violence was inflicted upon the victim. Styers' alleged post-homicide reference to the victim as "that little bastard" would not suggest that Defendant "relished" the murder even if the Court were inclined to impute the statement to Defendant. A review of the cases leaves the clear impression that more is required in order to establish that the killer relished the murder. [Citations omitted.] While the medical evidence suggests that at least two of the three wounds suffered by the victim were fatal, the firing of one, or even two, unnecessary shots does not lead to the conclusion that gratuitous violence was inflicted. See, e.g., State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986); State v. Ceja [126 Ariz. 35, 612 P.2d 491 (1980)]. On the other hand the evidence clearly demonstrates that this was a senseless murder and that the victim was helpless.

The next question is whether a finding that this murder was committed in an especially heinous or depraved manner can legitimately be made. The only factors articulated in Gretzler that are supported by the evidence are (1) the senselessness of the crime, and (2) the helplessness of the victim. Neither factor, considered in isolation, will ordinarily suffice. State v. Smith, 146 Ariz. 491, 707 P.2d 289 (1985). Any notion that the concurrence of these two factors cannot suffice, however, is laid to rest by State v. Stanley, supra, and State v. Wallace, supra.

. . . A vital consideration is whether the evidence supports the proposition that the murder in question "stands out from the norm of first degree murders . . . ." State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981). As articulated in Watson, this element appears to take the form of an overarching standard, having no connection to any specific aggravating circumstance. Numerous subsequent decisions, however, suggest that this element is part and parcel of the inquiry necessitated by § 13-703(F)(6). See e.g., State v. Stanley, [167 Ariz. at 529, 809 P.2d at 954]. The Court finds that this murder was both shocking and repugnant and does, indeed, stand out above the norm of first-degree murders.

(Emphasis added.)

We agree with the trial court's legal conclusions and factual findings with respect to heinousness and depravity. We have also discussed this issue separately in the companion case of Milke, ___ Ariz. at ___, ___ P.2d at ___, filed today. Nothing more needs to be added here.

d. Alleged Double Counting of Victim's Age

Defendant complains that the trial court gave the victim's age double weight by using the victim's age in support of two aggravating factors—A.R.S. § 13-703(F)(6) (heinousness or depravity) and (F)(9) (age of victim). Defendant's complaint is meritless. The use of one fact to establish two aggravating circumstances is proper, provided the court, in balancing the aggravating and mitigating factors does not weigh the young age of the victim twice. Because it is but one fact, it cannot be weighed twice, even though it satisfies two separate aggravating factors. See Schad, 163 Ariz. at 419, 788 P.2d at 1170; State v. Tittle, 147 Ariz. 339, 345, 710 P.2d 449, 455 (1985).

The trial court followed the law precisely, stating: "The Court concludes that it is not precluded from finding more than one aggravating circumstance based on the victim's young age and helplessness as long as those circumstances are considered only one time in the weighing process." (Emphasis added.)

e. Non-Statutory Mitigating Circumstances

> When a defendant is being sentenced for first degree murder, the sentencing court must consider, in addition to the mitigating circumstances of A.R.S. § 13-703(G), any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether a sentence less than death might be appropriate.

State v. McCall, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670 (1984). Defendant must prove the existence of mitigating circumstances by a preponderance of the evidence. State v. McMurtrey, 143 Ariz. 71, 73, 691 P.2d 1099, 1101 (1984).

The trial court found that none of the statutory mitigating circumstances existed. That finding is not challenged on appeal, and our review of the evidence confirms the trial court's findings in that respect. Defendant urged the following items as non-statutory mitigating factors: remorse, cooperation with the police, difficult family history or childhood, lack of prior felony convictions, employment history, history of alcohol abuse, good conduct while incarcerated and during trial, love for his mother, no threat of future criminal conduct, residual doubt regarding defendant's guilt, psychological history. Of these, the trial court found only the following constituted mitigating circumstances: cooperation with police; good conduct while incarcerated and during trial; loving relationship with his mother; and psychological history. The court concluded that his conduct while incarcerated and his relationship with his mother were not substantial factors. With one exception, our review of the evidence leads us to agree with the trial court's analysis of the proffered nonstatutory mitigating circumstances. The exception relates to the defendant's lack of a prior felony conviction.

The trial court's special verdict stated:

> Defendant offers his lack of a prior felony conviction as mitigation. Defendant cites no authority, [nor] is the court aware of any, for such a claim. This mitigating circumstance does not exist.

Defendant argues, correctly we conclude, that his lack of prior felony convictions does constitute a mitigating circumstance. In State v. Rossi (Rossi III), 171 Ariz. 276, 279, 830 P.2d 797, 800, cert. denied, ___ U.S. ___, 113 S. Ct. 610 (1992), State v. White, 168 Ariz. 500, 512, 815 P.2d 869, 881 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1199 (1992), and State v. Lavers, 168 Ariz. 376, 395, 814 P.2d 333, 352, cert. denied, ___ U.S. ___, 112 S Ct. 343 (1991), this court considered a defendant's lack of a prior criminal or felony record a relevant mitigating circumstance. We have also considered it in the cases of defendant's co-defendants, as did the trial courts in those cases. Milke, ___ Ariz. at ___, ___ P.2d at ___; and State v. Styers, ___ Ariz. ___, ___ P.2d ___ (1993).

We have also held, however, that arrests or misdemeanor convictions may be considered when lack of felony convictions "is advanced as a mitigating factor." Rossi III, 171 Ariz. at 279, 830 P.2d at 800; Lavers, 168 Ariz. at 395, 814 P.2d at 352. Although defendant has no prior felony convictions, he does have a criminal history of arrests and misdemeanors. Defendant has three misdemeanor charges that are over 25 years old, an arrest for assault in 1982, and a misdemeanor conviction for public indecency in 1985. The presentence report, which may properly be considered on matters of mitigation, shows that defendant has admitted to four arrests between 1972-74 for driving under the influence. These factors may be considered in determining the weight to give to the mitigating evidence of lack of a felony conviction. See Lavers, 168 Ariz. at 395, 814 .2d at 352.

Based upon our review of all the proffered mitigating evidence, we agree with all aspects of the trial court's consideration of statutory and non-statutory mitigating circumstances except we conclude that lack of a prior felony record is a non-statutory mitigating circumstance. See Rossi III, 171 Ariz. at 279, 830 P.2d at 800; White, 168 Ariz. at 512, 815 P.2d at 881; Lavers, 168 Ariz. at 395, 814 P.2d at 352.

Finally, regarding mitigating circumstances, the trial court considered the giving of a felony murder instruction even though defendant did not suggest it as a mitigating circumstance. "[T]he fact that a felony-murder instruction was given to the jury is not relevant 'where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death.'" Gillies, 135 Ariz. at 513, 662 P.2d at 1020. Here defendant was found guilty, not only of felony murder (at the least), but of conspiracy to commit first degree murder. Defendant's conduct in this whole affair was not insignificant. We concur with the trial court's analysis of the weight to be given to the felony murder instruction in this case.

f. Independent Review

This court independently reviews the record to determine whether the death penalty is appropriate. See State v. Watson, 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981). We agree with the trial court's findings of three separate statutory aggravating circumstances. Therefore, under Arizona law, death is mandated unless there are mitigating circumstances sufficiently substantial to call for leniency. Like the trial court, we find the mitigation lacking, even though we consider one more non-statutory mitigating circumstance than did the trial court. Under the circumstances of this case this additional mitigating circumstance has minimal significance. The death penalty is appropriate in this case under Arizona law.

DISPOSITION

We have reviewed the record for fundamental error and found none. Because we conclude defendant was properly convicted and sentenced, we affirm his convictions and sentences on all counts.

James Moeller
Vice Chief Justice

____
Robert J. Corcoran, Justice

____
Thomas A. Zlaket, Justice

____
Frederick J. Martone, Justice

____
Ruth V. McGregor, Judge

Chief Justice Stanley G. Feldman did not participate in the determination of this matter. Pursuant to Ariz. Const. art. VI, § 3, Judge Ruth V. McGregor of the Court of Appeals, Division One, was designated to sit in his stead.

APPENDIX D

OK FILE
Office Distribution
Victim Witness Division X

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

December 11, 1996
D. Reinertson
Deputy

HON. DAVID R. COLE

No. CR 89-12631

FILED: Dec. 13 1996

STATE OF ARIZONA
Attorney General
By: Randall M. Howe

v.

ROGER M. SCOTT
Leslie M. Madsen
Appeals Section

The Court having considered all pleadings filed in connection with Defendant's Motion to Vacate Order Denying Post-Conviction Relief and Defendant's Motion for Extension of Time and Leave to File a Motion for Rehearing Nunc Pro Tunc and Amended Petition for Post-Conviction Relief, and having concluded that it has no authority to grant any of the forms of relief requested, IT IS ORDERED that Defendant's Motions are denied.

By way of explanation, there is little doubt that this Court is authorized, upon a showing of good cause, to permit a defendant to amend a petition for post-conviction relief before a dispositive order issues. See Rule 32.6(d), A.R.Crim.P. Here, however, Defendant seeks an order vacating this Court's order dismissing his Petition for Post-Conviction Relief.

The cases cited by Defendant do not support his contention that the Court has authority to grant the requested relief. State v. Brooks, 161 Ariz. 177, 777 P.2d 675 (App. 1989), stands for the proposition that this Court has "inherent authority to modify or vacate orders which it enters **by mistake**." 161 Ariz. at 179, 777 P.2d at 677 (emphasis supplied). Defendant then cites State v. Lopez, 96 Ariz. 169, 393 P.2d 263 (1964), which is cited in Brooks, in support of his claim that, in the absence of applicable criminal rule, the Court is authorized to apply Rules 59 and 60, A.R.Civ.P., and grant relief pursuant to those rules. Leaving aside the question whether application of either rule would result in an order granting relief, Defendant's reliance upon Lopez is misplaced. Rule 32, A.R.Crim.P., and its statutory counterpart provide a comprehensive scheme for post-conviction review. To grant the relief requested by Defendant would be contrary to the underlying purpose of Rule 32 and inconsistent with its procedures.

IT IS ORDERED extending time for filing of a motion for rehearing or petition for review to and including January 10, 1997.

The Court notes, in passing, that Claim 21 (see page 26, Amended Petition for Post-Conviction Relief) is based on an incorrect premise. A different judge presided over each of the three trials.

APPENDIX E

_x____Filed ___Lodged Apr 07 2000
______Received ___Copy
MAR 31 2000
Clerk U S District Court
District of Arizona
By: s/__________ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Roger Mark Scott,)
)
Petitioner,) CV-97-1554-PHX-PGR
)
v.) **ORDER**
)
Terry Stewart, et al.,)
)
Respondents.)
____________________)

Petitioner Roger Mark Scott ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. (File doc. 1).[1] The Second

---

[1] Petitioner filed his initial Petition for Writ of Habeas Corpus on July 25, 1997. f (File doc. 1.) This Court has therefore applied the applicable provisions of the Antiterrorism and Effective Death Penalty Act to this ase. *See* Lindh v. Murphy, 521 U.S. 320, 336 (1997).

"File doc." refers to the documents in this Court's file. "M.E." refers to the minute entries of the state court, "R.O.A." refers to (Continued)

Amended Petition raises seven claims, including numerous subclaims. (File doc. 111). This Order addresses procedural bar and other issues raised by Respondents' Answer to the Petition. For the reasons set forth herein, the Court finds that Claims 1 (in part), 2, 3 (in part), 5 (in part), and 6(D) are procedurally barred. Claims 1 (in part, 3 (in part), 5 (in part), 6(B), and 6(F) are not cognizable on federal habeas review. Claims 3 (in part), 4, 6(A) (in part), 6(C), and 7 are meritless. Claims 6(A) (in part) and 6(E) are premature and not yet ripe for review. Claim 1 (in part) will be decided on the merits in a separate order.

BACKGROUND

In the late morning on Saturday, December 2, 1989, Petitioner and James Styers took Debra Milke's son, Christopher, to the desert to kill him. State v. Scott, 177 Ariz. 131, 134, 865 P.2d 792, 795 (1993). Milke and Styers had offered Petitioner $250 if he would drive the car. Id. In the desert, they stopped the car near a wash, and Petitioner and Styers took Christopher into the wash "to look for snakes." Id. Styers told Petitioner that he planned to leave Christopher's body close to the road so that it would be found in a few days. Id. Styers then told Petitioner to drive the car north a little ways, then to turn around and pick Styers up south of the wash. Id.

Petitioner drove north, turned around, and came

(Continued).

the state court record on appeal, and "R.T." refers to the reporter's transcripts.

back to the wash area but was unable to pull over because there was traffic behind him. Id. After making several passes by the wash, Petitioner pulled over and got out of the car. Id. He then heard three shots being fired. Id. Styers came out to the road and got into the car. Id. As Petitioner drove, Styers tossed the bullet shells out the window between 99th and 83rd Avenues. Id.

Petitioner drove to the Metrocenter shopping mall. Id. Styers reported to mall security that he had taken Christopher to the mall to see Santa Claus, but that Christopher had disappeared while Styers was using the restroom. Id. Metrocenter security then called the police. Id.

In the mid-afternoon, Styers and a Sears employee approached Petitioner in the mall and asked him if he had seen Christopher. Id. Petitioner said that he had not seen Christopher and that Petitioner had come to the mall with a friend named Phil. Id. Styers and Petitioner then went into the parking lot, where Styers gave Petitioner the gun and Styers' tennis shoes. Id. Petitioner threw the shoes into a planter in the parking lot and took the gun home. Id. at 134-35, 865 P.2d at 795-96.

Styers remained at the mall. Id. at 135, 865 P.2d at 796. At about 12:30 a.m. the next day, Styers told the police that he had been with Petitioner and Christopher during the previous morning. Id. Police then went to Petitioner's home, and Petitioner told police the same story that Styers had told them. Id. A few hours later, police asked Petitioner to come to the police station, and Petitioner voluntarily went to the station. Id. At the station, Petitioner twice repeated the story he earlier gave to the police. Id.

At about 12:45 p.m. on Sunday, a detective read Petitioner his Miranda rights. Id. A few hours later, Petitioner told the detective that the "Phil" story was a lie, and he then led police to Christopher's body. Id. He also showed police where Styers had thrown the bullet shells and the tennis shoes which had been thrown in the planter. Id.

Petitioner was charged with first degree murder, conspiracy to commit first degree murder, and kidnapping. (R.O.A., Item No. 1). A jury found Petitioner guilty on all three counts. (R.O.A., Item Nos. 59, 60, 62). Petitioner was sentenced to death on the first degree murder count. (M.E. 4/22/91).

A notice of appeal was filed on April 30, 1991. (R.O.A. Item No. 499). The Arizona Supreme Court denied the appeal and affirmed Petitioner's convictions and sentences on December 21, 1993. Scott, 177 Ariz. at 145, 865 P.2d at 806. Petitioner filed a Motion for Reconsideration on January 5, 1994, which was summarily denied on February 15, 1994. An unsuccessful petition for writ of certiorari was filed in the United States Supreme Court. Scott v. Arizona, 513 U.S. 842 (1994) (denying certiorari review).

A notice for post-conviction relief was filed on October 14, 1994. On May 31, 1995, Petitioner filed a Petition for Post-Conviction Relief ("PCR") pursuant to Ariz. R. Crim. P. 32. (R.O.A., Item No. 532). In the post-conviction proceedings, the trial court ("Rule 32 court") scheduled oral argument (M.E. 11/6/95) and an evidentiary hearing (M.E. 1/18/96). The Rule 32 court subsequently requested both parties to submit proposed findings of fact and conclusions of law. (R.O.A., Item No. 609). The Rule 32 court eventually dismissed the PCR. (M.E. 6/11/96).

Following a change of counsel in the post-conviction proceedings, Petitioner filed a Motion to Vacate Order Denying Post-Conviction Relief. (R.O.A., Item No. 634). He also filed a Motion for Extension of Time and Leave to File a Motion for Rehearing Nunc Pro Tunc and Amended Petition for Post-Conviction Relief. (R.O.A., Item No. 636). The Rule 32 court denied both motions. (M.E. 12/11/96).

Petitioner filed a Petition for Review in the Arizona Supreme Court seeking review of the post-conviction proceedings. (R.O.A., Item No. 649). He subsequently filed an Amended Petition for Review. (R.O.A., Item No. 654). The Arizona Supreme Court denied the Amended Petition for Review without comment on June 24, 1997.

On July 25, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in this Court. (File doc. 1). He filed an Amended Petition (File doc. 53) on May 5, 1998, and a Second Amended Petition (File doc. 111) on July 26, 1999. Along with his Second Amended Petition he submitted a supporting memorandum. (File doc. 112). Respondents filed an Answer regarding the procedural status of Petitioner's claims on August

3, 1999. (File doc. 113).[2] Petitioner filed his Traverse on August 23, 1999. (File doc. 115). Respondents filed a reply on September 3, 1999, and Petitioner filed a sur-reply on September 16, 1999. (File docs. 116 & 117).

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Before a federal court may review a petitioner's claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 520 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351 (1989). A petitioner must also seek discretionary review with the state's highest court where such review "is part of the [state's] ordinary appellate review procedure[.]" O'Sullivan v. Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 1733 (1999).

A claim is fairly presented if the petitioner has described the operative facts and the legal theories on which his federal habeas claim is based. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor, 404

---

[2] The parties had previously briefed the procedural status of Petitioner's claims in relation to the first Amended Petition. See file docs. 78, 86, 89, and 92.

U.S. 270, 277-78 (1971).[3] In state court, the petitioner must describe not only the operative facts but also the asserted constitutional principle. The United States Supreme Court stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995).[4] Similarly, a claim may be considered unexhausted if it includes new factual allegations which were not presented to the state court. New factual allegations render a claim unexhausted when they fundamentally alter the legal claim already considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 260 (1986). Federal-state comity favors the principle that federal courts should not "entertain new evidence that places [a] claim in a significantly different posture, when that evidence was never presented to the state courts." Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988), cert. denied, 490 U.S. 1059 (1989). A federal habeas court will not review the claim unless cause and prejudice or a fundamental miscarriage of justice is established.

---

[3] Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995), cert. denied, 517 U.S. 1172 (1996); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

[4] If the petitioner has not fairly presented a federal claim to the state's highest court, his claim may nevertheless not be procedurally barred if the state court sua sponte reaches the merits of the federal claim. See Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991).

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, the claims are "technically" exhausted. Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982)). However, before the Court may review a technically exhausted claim on the merits, the petitioner must demonstrate legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or show that a fundamental miscarriage of justice would result. Similarly, if a claim was raised in state court but found precluded or waived, the Court may not hear the claim absent a showing of cause and prejudice or a fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 338 (1992); Coleman, 501 U.S. at 735 n.1; Engle, 456 U.S. at 129.

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488 (1986).

"Prejudice" is actual harm resulting from the alleged constitutional error. Id. at 494. If a petitioner cannot meet the cause and prejudice standard, the federal court still may hear the merits of procedurally barred claims if the failure to hear the claims would constitute a "miscarriage of justice." Sawyer, 505 U.S. at 339.

The fundamental miscarriage of justice exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: 1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and 2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable [fact finder]" would have found the existence of an aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336. Claims regarding errors in the submission of mitigation evidence do not relate to a "condition of eligibility" and cannot form a basis for relief under this exception. Id. at 345-47.

Claims of actual innocence of the crime itself are judged under a different standard. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). In order to meet this standard, the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id.[5] Furthermore:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was

---

[5] Substantive (or "free-standing") claims of actual innocence must be distinguished from procedural claims. See Schlup, 513 U.S. at 313-14. In Herrera v. Collins, 506 U.S. 390 (1993), the petitioner advanced his claim of innocence to support a novel substantive constitutional claim that the execution of an innocent person would violate the Eighth Amendment even if the proceedings that had resulted in his conviction and sentence were entirely fair and error-free. In that case an extraordinarily high standard of review was applied. In contrast, in Schlup the petitioner accompanied his innocence claim with an assertion of constitutional errors at trial (ineffectiveness of counsel and withholding of evidence). In such a case, if a petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup, 513 U.S. at 316.

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
>
> . . . .
>
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
>
> *(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.*
>
> b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), and (g). When a claim under [these sub-sections] is raised in a successive or untimely petition, the petition must set forth the reasons for not raising the claim in the previous petition in a timely manner, If meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the petition shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (emphasis added). Thus, pursuant to Rule 32.2(a)(3), petitioners generally will not be granted relief on any claim which could have been raised in the direct appeal or in a prior Rule 32 petition for post-conviction relief. The preclusive effect of Rule 32.2 can be avoided only if a claim falls within certain exceptions (sub-sections (d) through (g) of Rule 32.1) and the petitioner can justify why the claim was not raised in a timely manner.

Therefore, in the present case, if there are claims which have not been raised previously in state court, the Court must determine whether Petitioner has state court remedies currently available to him pursuant to Rule 32. If there are none, he has "technically exhausted" the claims. However, this Court will not review the claims on the merits unless the Petitioner demonstrates legitimate cause and actual prejudice to excuse his failure to raise the claims in earlier state court proceedings, or shows that a fundamental miscarriage of justice would result. Coleman, 501 U.S. at 735 n.1; Engle, 456 U.S. at 129. Similarly, if a claim was raised in state court but found precluded or waived, the federal court will not hear the claim absent a showing of cause and prejudice or a fundamental miscarriage of justice.

DISCUSSION

Claim 1: **Petitioner did not receive competent representation during pretrial, trial, sentencing, appeal, and post-conviction proceedings in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 2, Section 24 of the Arizona Constitution.**

In Claim 1, Petitioner alleges that he was never represented by competent counsel during any of the state proceedings and that he was thus denied a fair trial. Specifically, he claims his counsel was ineffective in the following respects:

(1) Trial counsel failed to spend adequate time to develop a coherent defense;

(2) Trial counsel failed to provide relevant materials to Dr. Tatro, one of the two court-appointed psychiatrists, and failed to meet or confer with Dr. Tatro prior to Dr. Tatro's evaluation;

(3) Trial counsel failed to ask Dr. Tatro to testify;

(4) Trial counsel failed to request another psychiatric evaluation or to relitigate the psychiatric issues even though it was clear that Petitioner could not understand the criminal process;

(5) Trial counsel failed to get Petitioner to understand and accept the plea offered by the prosecution;

(6) Trial counsel failed to launch an adequate challenge to the voluntariness of Petitioner's confession;

(7) Trial counsel failed to object to the prosecution's use of Petitioner's Rule 11.4 statements;

(8) Trial counsel introduced hearsay statements by Styers implicating Petitioner as the person who shot Christopher;

(9) Trial counsel failed to gather and present available mitigation evidence to the sentencing judge;

(10) Trial counsel asked the sentencing court not to consider the pre-sentence report, even though the report contained requests for leniency;

(11) Appellate counsel failed to investigate the ineffective assistance of trial counsel issues;

(12) Appellate counsel failed to present mitigating evidence;

(13) Appellate counsel failed to challenge the voluntariness of Petitioner's confession;

(14) Appellate counsel failed to address the sentencing judge's failure to consider the requests for leniency;

(15) Appellate counsel failed to challenge the improper use of 801(d) evidence; and

(16) Appellate counsel failed to challenge the finding of the pecuniary gain aggravating factor.

He also claims his post-conviction counsel was ineffective for failing to conduct an independent investigation, for inadequately presenting only one claim to the Rule 32 court, and for failing to present the remainder of Petitioner's constitutional claims to the Rule 32 court.

Only violations "of the Constitution or laws or treaties of the United States" may be litigated in the context of a petition for writ of habeas corpus. 28 U.S.C. § 2254(a). Therefore, Petitioner's claim that his post-conviction counsel was ineffective is not cognizable on federal habeas review since there is no right to the effective assistance of post-conviction counsel. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); see also, 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during . . . State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). In addition, to the extent Petitioner claims his rights under the Arizona Constitution were violated, such claims are also not cognizable on federal habeas review.

In his PCR, Petitioner asked the Rule 32 court to set aside his sentence because his trial and appellate counsel failed to raise, and the state court failed to consider, the fact that the victim's father had asked for leniency as a mitigating circumstance. (PCR at 1). Petitioner claimed that "[b]ecause the 'plea for leniency' was considered neither at trial nor appeal, [he] is entitled to be resentenced." (PCR at 3). In his Reply in support of his PCR, Petitioner identified the claim as an ineffective assistance of counsel claim. (Reply in Support of PCR at 1). The Rule 32 court dismissed the PCR, finding that although the request for leniency was a mitigating circumstance, Petitioner had failed to show that he was prejudiced by his counsel's failure to urge that circumstance before or during the sentencing hearing. (M.E. 6/11/96) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

In a subsequent motion, Petitioner, through new post-conviction counsel, sought leave to file an amended PCR, claiming that the first post-conviction counsel failed to raise several viable claims. The Rule 32 court denied the motion pursuant to Ariz. R. Crim. P. 32. (M.E. 12/11/96). Petitioner filed an Amended Petition for Review seeking review of the Rule 32 court's dismissal of the PCR and denial of Petitioner's request to file an amended PCR. The Arizona Supreme Court denied the Amended Petition for Review without comment.

Respondents concede that to the extent Petitioner claims his trial counsel was ineffective for failing to argue the victim's father's plea of leniency, such a claim was properly exhausted. The Court will therefore review the merits of that allegation. In all other respects, however, the Court finds that Claim 1 was not fairly presented to the state court. Petitioner did not raise any other allegations of ineffective assistance of counsel in a procedurally appropriate manner to the state's highest court. See Castille, 489 U.S. at 351. Although he attempted to raise many of these allegations in an amended PCR, the state court found that an amended PCR could not be properly filed under Ariz. R. Crim. P. 32.

A state court's ruling that a claim is precluded may constitute an adequate and independent ground upon which procedural default may be found. In order for an adequate state ground to bar federal review, the state must apply state law that is firmly established and regularly applied at the time of the default. See Ford v. Georgia, 498 U.S. 411, 423-24 (1991). The Rule 32 court's preclusion ruling, which is based upon Rule 32, Ariz. R. Crim. P., is a state procedural ruling that is regularly and consistently followed in Arizona and therefore constitutes an adequate and independent ground upon which a procedural default can be found. See Poland v. Stewart, 117 F.3d 1094, 1106 (1997), cert. denied, 523 U.S. 1082 (1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir.), cert. denied, 519 U.S. 1030 (1996). If Petitioner were now to return to state court, these ineffective assistance of counsel allegations would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3) and they are technically exhausted. Petitioner must therefore demonstrate cause and prejudice or a fundamental miscarriage of justice in order for the Court to review these allegations on the merits.

Petitioner claims that cause exists to set aside the default in the following respects: (1) his post-conviction counsel was ineffective under the Sixth and Fourteenth Amendments, (2) the Rule 32 court appointed Petitioner incompetent post-conviction counsel and disregarded Petitioner's pleas concerning the incompetence of his counsel in violation of Petitioner's right to due process, (3) the Rule 32 court did not permit Petitioner to file an amended PCR, and (4) the State argued that Petitioner should not be allowed to file an amended PCR.[6] "[T]he exhaustion doctrine . . . generally requires that a claim of ineffective assistance [of counsel] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Murray, 477 U.S. at 488-89. Since there is no constitutional right to be represented by competent counsel during post-conviction proceedings, Petitioner cannot demonstrate cause. Finley, 481 U.S. at 555. In addition, even if there were a right to competent post-conviction counsel under Arizona law, the deprivation of that right does not constitute an independent constitutional violation which may be used to establish cause. See Bonin v. Vasquez, 999 F.2d 425, 430-31 (9th Cir. 1993).

---

[6] Petitioner also argues that the state court failed to conduct a proportionality review in violation of the Eighth Amendment and that the denial of jury participation in the determination of aggravating circumstances constitutes structural error. The Court fails to see the relevance of any of these arguments to the cause analysis. Petitioner must demonstrate that "some objective factor (Continued)

The Rule 32 court's decision not to allow Petitioner to file an amended PCR was well within its discretion. See Ariz. R. Crim. P. 32.6(d) ("no amendments shall be permitted except by leave of court upon a showing of good cause"). Moreover, even if the Rule 32 court erroneously failed to substitute post-conviction counsel or to allow Petitioner to file an amended PCR, such errors would not constitute cause for the failure of Petitioner's first PCR counsel to raise these ineffective assistance of counsel claims in a procedurally appropriate manner. The Court also rejects Petitioner's assertion that cause exists because the

---

(Continued).

external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. Independent substantive claims of constitutional error of the type asserted here are not objective factors external to the defense which can be used to establish cause for Petitioner's failure to raise the ineffective assistance of counsel claims in state court.

State argued that Petitioner should not be allowed to file an amended PCR. Absent a legitimate showing of cause, the Court will not conduct a prejudice analysis.

Petitioner summarily argues that a fundamental miscarriage of justice will occur if the Court does not review this claim on the merits. He claims that his death sentence is undermined because his counsel failed to provide available mitigating evidence to the sentencing court, including the prosecution's plea offer, the victim's father's request for leniency, and testimony from Dr. Tatro. He also claims that Dr. Tatro's evaluation undermines the finding of guilt.

The Court will construe these arguments as "innocent of the death sentence" and "innocent of the crime" arguments. Petitioner has not shown "by clear and convincing evidence that, but for a constitutional error, no reasonable [fact finder]" would have found the existence of an aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Sawyer, 505 U.S. at 336. Petitioner has also not shown that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 513 U.S. at 327. Rather, Petitioner's claims concern alleged errors in the submission of mitigation evidence, and since such submissions do not relate to a "condition of eligibility," they cannot form a basis for relief under the fundamental miscarriage of justice exception. Sawyer, 505 U.S. at 345-47. Accordingly, Petitioner has not demonstrated that a fundamental miscarriage of justice will occur if the Court does not review the remainder of Claim 1 on the merits.

The Court will review Claim 1 on the merits only insofar as Petitioner claims that his trial counsel was ineffective for failing to argue the victim's father's plea of leniency. In all other respects, Claim 1 is either procedurally defaulted or not cognizable on habeas review, and the Court will not review those aspects of Claim 1 on the merits.

Claim 2: Petitioner was not competent to stand trial or to make an informed decision to reject the plea offer.

Petitioner admits that this claim was not presented to the state court. (File doc. 111 at 11). The Court therefore finds that this claim was not fairly presented to the state court, and if Petitioner were now to return to state court, this claim would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3). Petitioner must therefore demonstrate cause and prejudice or a fundamental miscarriage of justice in order for the Court to review the merits of Claim 2.

Petitioner claims that cause exists to set aside the default because (1) all prior counsel were ineffective, (2) the Rule 32 court did not allow him to file an amended PCR, and (3) the State argued that Petitioner should not be allowed to file an amended PCR. In order for a claim of ineffective assistance of counsel to constitute cause to set aside the default, it must have been presented to the state courts as an independent claim. Murray, 477 U.S. at 488-89. The only claim of ineffective assistance of counsel which was fairly presented to the state court does not establish cause with respect to Claim 2. In addition,, the Rule 32 court's decision not to allow Petitioner to file an amended PCR does not constitute cause to set aside the default, because that decision constituted an adequate and independent ground upon which a procedural default can be found. See discussion, supra at 11. Even if the Rule 32 court had erred in making that decision, such an error does not provide cause for the failure of Petitioner's counsel to present this claim to the state court in a procedurally appropriate manner. Finally, the Court rejects any assertion that the State's argument that Petitioner not be allowed to file an amended PCR constitutes cause. Absent a legitimate showing of cause, the Court will not determine prejudice.

Petitioner has not demonstrated that a fundamental miscarriage of justice will occur if the Court does not review this claim on the merits. See discussion, supra, at 12-13. The Court will therefore not review Claim 2 on the merits.

Claim 3: Prior counsel failed to adequately present both statutory and nonstatutory mitigating factors in violation of Petitioner's Eighth and Fourteenth Amendment rights under the United States Constitution and his rights under the Arizona Constitution, Article II, Sections 1, 2, 4, 15, and 24.

In Claim 3, Petitioner claims that his trial counsel, the sentencing judge, and the prosecution should have been aware of potential mitigation which needed to be considered. Although not stated in so many words, it appears that Petitioner is claiming that his trial counse was ineffective for failing to present available mitigating evidence and that the sentencing judge violated Petitioner's Eighth and Fourteenth Amendment rights by failing to consider that evidence.

To the extent Petitioner claims his trial counsel was ineffective for failing to present mitigation evidence, such a claim is procedurally barred. See discussion, supra, at 9-13. In addition, insofar as Petitioner claims that his rights under the Arizona Constitution were violated, such a claim is not cognizable on federal habeas review. 28 U.S.C. § 2254(a).

To the extent Petitioner claims that the sentencing judge failed to consider mitigation evidence, the Court finds this claim is meritless. See 28 U.S.C. § 2254(b)(2)(West 1999) (district court may deny habeas application on merits notwithstanding failure to exhaust). Petitioner has not claimed that the sentencing judge failed to consider any specific mitigating evidence that was actually presented to the sentencing judge.[7] Rather, he claims that evidence of potential mitigation "was alluded to at different times throughout the State proceedings but was not coherently or intelligently presented to the trial court with substantiation and in such a manner that the trial court could make the necessary finding that the mitigation explained how Petitioner ended up participating in this crime." The Court will not further review Claim 3.

---

[7] Although he alleges that the record suggests that he had an alcoholic father, he states that evidence of his father's alcoholism was not presented to the state court as mitigation. (File doc. 112 at 52). Accordingly, the state court committed no constitutional violation by not considering such mitigation. See Jeffers v. Lewis, 38 F.3d 411, 418 n.2 (9th Cir. 1994) (en banc), cert. denied, 514 U.S. 1071 (1995).

Claim 4: Petitioner's sentence was disproportionate when his role is compared with the roles played by his two co-defendants. The state court erred in failing to perform a proportionality study, violating the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

In Claim 4, Petitioner argues that the state court should have performed a proportionality review before imposing the death sentence. Petitioner admits that he did not present this claim to the state court. (File doc. 111 at 13).

Regardless of whether Petitioner properly exhausted this claim, the Court finds that Claim 4 is meritless. See 28 U.S.C. § 2254(b)(2). There is no federal right to proportionality review where state law does not provide for such review Pulley v. Harris, 465 U.S. 37, 43-45 (1984). In State v. Salazar, 173 Ariz. 399, 416-17, 844 P.2d 566, 583-84 (1992), cert. denied, 509 U.S. 912 (1993), the Arizona Supreme Court held that proportionality reviews would no longer be conducted in death penalty cases. Since Petitioner possessed no constitutional right to a proportionality review, the Court will deny Claim 4.

Claim 5: **The trial court's failure to make an inquiry into Petitioner's reasons for expressing concern about his trial counsel prior to trial and his adamant concerns about post conviction relief counsel was a violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights to a fair trial, competent counsel, and due process.**

In Claim 5, Petitioner alleges that the trial court failed to make an appropriate inquiry after Dr. Tatro alerted the trial court that Petitioner had expressed concern and disappointment regarding his appointed counsel. He also claims that the Rule 32 court failed to conduct a similar inquiry after Petitioner complained about the performance of post-conviction counsel. Petitioner admits that he did not present this claim to the state court. (File doc. 111 at 14.)

To the extent Petitioner claims that the Rule 32 court failed to conduct an inquiry, such a claim is not cognizable on habeas review since it is an alleged error in the state post-conviction review process. See Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir.), cert. denied, 493 U.S. 1012 (1989). Insofar as Petitioner claims that the trial court failed to conduct an inquiry prior to trial, the Court finds this claim was not fairly presented to the state court. If Petitioner were now to return to state court, this claim would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3). Furthermore, Petitioner has not demonstrated cause for his failure to present this claim to the state court,[8] nor has he demonstrated that a fundamental miscarriage of justice will occur if the Court does not review this claim on the merits.[9] The Court finds this aspect of Claim 5 procedurally defaulted. The Court will not review Claim 5 on the merits.

Claim 6:

(A) The methods of execution used in Arizona constitute cruel and unusual punishment in violation of the EighthAmendment.

Petitioner claims that the two methods of execution which are used in Arizona constitute cruel and unusual punishment. Specifically, he claims that both the gas chamber and lethal injection methods of execution violate the Eighth Amendment.

Regardless of whether Petitioner properly exhausted this claim, the Court finds that Petitioner's allegation that death by lethal injection is unconstitutional lacks merit. See 28 U.S.C. § 2254(b)(2); Poland, 117 F.3d at 1105. In addition, Petitioner's allegation that death by lethal gas is unconstitutional is not ripe for review, because has not yet chosen lethal gas as the method of execution to be used in his case. Id. at 1104; see A.R.S. § 13-704(B) ("A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection."). The Court will therefore dismiss this Petitioner's claim that death by lethal gas is unconstitutional.[10] The Court will not further view Claim 6(A).

---

[8] In his Traverse, Petitioner appears to argue that cause exists to set aside the default. However, his cause argument does not specify with any degree of clarity which claims should be reviewed notwithstanding a procedural bar. The Court will assume that Petitioner's cause argument relates to Claim 5. Even making that assumption, however, the Court must reject Petitioner's cause argument. See discussion, supra, at 11-12.

[9] Petitioner has asserted only one fundamental miscarriage of justice argument, which this Court has already rejected. See discussion, supra, at 12-13.

(B) Treatment of inmates awaiting execution violates the Eighth Amendment.

Petitioner alleges that the treatment a death row inmate receives in the last twenty-four to forty-eight hours before an execution is inhumane. Petitioner admits that this allegation was not presented to the state court. (File doc. 111 at 16).

---

[10] Although this allegation is not ripe for review, the Court notes that since at least one of the two methods of execution available in Arizona is not unconstitutional, if Petitioner selects execution by lethal gas, he will waive his right to claim a constitutional violation. Stewart v. LaGrand, 526 U.S. 115, 119 S. Ct. 1018, 1020 (1999).

The Court finds that Claim 6(B) is not cognizable on federal habeas review. Habeas relief can only be granted on claims that a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement. A civil rights action, in contrast, is the proper method of challenging 'conditions of ... confinement.'" Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) (citing Preiser v. Rodriguez, 411 U.S. 475, 484, 498-99 (1973)).

In Claim 6(B), Petitioner challenges only the conditions of confinement which may exist in the last twenty-four to forty-eight hours prior to his execution, not "the fact or duration of his physical confinement." See Preiser, 411 U.S. at 498. Claim 6(B) is thus not cognizable on habeas review. Moreover, even if such a claim were cognizable, it is not ripe for review since Petitioner has yet to be confined in the manner which he claims is unconstitutional. The Court will not review Claim 6(B) on the merits.

(C) The failure to consider the cost of executions as a mitigating factor violates Skipper v. South Carolina, 476 U.S. 1 (1986) and Ake v. Oklahoma, 470 U.S. 68 (1985).

Petitioner argues that the cost of implementing the death penalty should have been considered as a mitigating factor. Petitioner admits that he did not present this allegation to the state court. (File doc. 111

at 16).

Regardless of whether Petitioner properly exhausted this claim, the Court finds that Claim 6(C) is meritless. See 28 U.S.C. § 2254(b)(2). While a sentencing authority must consider all relevant mitigating evidence, "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense" continues to exist. Lockett v. Ohio, 438 U.S. 586, 604 n.12 (1978) (purality opinion). The Arizona Supreme Court has rejected the argument that the cost of executions should be considered as a mitigating factor, because "the economic cost of the death penalty is unrelated to [the defendant], his character or record, or the circumstances of his offense." State v. Clabourne, 194 Ariz. 379, 983 P.2d 748, 757 (1999). The Court will therefore not further review Claim 6(C).

(D) The statute fails to provide for standardization in violation of the Eighth Amendment.

Petitioner claims that the Arizona death penalty statute is unconstitutional because it fails to channel the prosecutor's discretion and results in the arbitrary and capricious imposition of the death penalty. Petitioner admits that he did not present this allegation to the state court. (File doc. 111 at 17).

The Court finds that Claim 6(D) was not fairly presented to the state court. If Petitioner were now to return to state court, this claim would be precluded pursuant to Ariz. R. Crim. P. 32.2(a)(3). In order for the Court to review Claim 6(D) on the merits, Petitioner must demonstrate either cause and prejudice or a fundamental miscarriage of justice.

Petitioner has not demonstrated that cause exists to set aside the default. See discussion, supra, at 11-12. Petitioner has also not demonstrated that a fundamental miscarriage of justice will occur if the Court does not review this allegation on the merits. See discussion, supra, at 12-13. The Court will thus not review Claim 6(D) on the merits.

(E) Petitioner is not competent to be executed.

Both Petitioner and Respondents admit that this allegation is not ripe and is premature. (File doc. 115 at 38; file doc. 113 at 29). Pursuant to Martinez-Villareal v. Stewart, 118 F.3d 628, 634 (9th Cir. 1997), aff'd, 523 U.S. 637 (1998), such a claim "must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed." Therefore, the Court will dismiss Claim 6(E) without prejudice as premature.

(F) Petitioner is being denied a fair clemency process in violation of the Fifth, Eighth, and Fourteenth Amendments.

In Claim 6(F), Petitioner alleges that he cannot have fair clemency proceedings given the attorney general's role as the Board's legal advisor and as an advocate against Petitioner. He also alleges that the Board's selection process, composition, training, and procedures will also prevent him from receiving a fair and impartial hearing.

The Court finds that Claim 6(F) is not cognizable on federal habeas review. Habeas relief can only be granted on claims that a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Challenges to state clemency procedures or proceedings do not represent an attack on the prisoner's detention and thus do not constitute proper grounds for habeas relief.[11] See Franzen, 877 F.2d at 26.

Claim 7: **Aggravating factors, which must be found to exist beyond a reasonable doubt, are elements of the offense, not sentencing enhancers, and to find otherwise violates the Sixth Amendment to the United States Constitution's Due Process Clause.**

Petitioner claims that aggravating factors, which must be found to exist beyond a reasonable doubt, are elements of the offense, not sentencing enhancers, and must therefore be found by a jury. Regardless of whether Petitioner properly exhausted this claim, the Court finds that Claim 7 is meritless. See 28 U.S.C. § 2254(b)(2). Aggravating circumstances are not elements of first degree murder. Walton v. Arizona, 497 U.S. 639, 648 (1990); see also Poland v. Arizona, 476 U.S. 147, 156 (1986) ("Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment.") The Court will not further review Claim 7.

---

[11] Such claims, when they arise, are properly pursued under 42 U.S.C. § 1983. See e.g., Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S. Ct. 1244, 1254 (1998) (O'Connor, Souter, Ginsburg, and Breyer, JJ., concurring, and Stevens, J., concurring separately) ("minimal procedural safeguards apply to clemency proceedings"); Woratzeck v. Arizona Bd. Of Executive Clemency, 117 F.3d 400, 402-03 (9th Cir. 1997) (proper vehicle for challenging clemency proceedings is a claim under 42 U.S.C. § 1983).

CONCLUSION

For the reasons set forth herein, the Court finds that Claims 1 (in part), 2, 3 (in part), 5 (in part), and 6(D) are procedurally barred. Claims 1 (in part), 3 (in part), 5 (in part), 6(B), and 6(F) are not cognizable on federal habeas review. Claims 3 (in part), 4, 6(A) (in part), 6(C), and 7 are meritless. Claims 6(A) (in part) and 6(E) are premature and not yet ripe for review. Claim 1 (in part) will be decided on the merits in a separate order.

Based on the foregoing,

IT IS ORDERED that, no later than thirty (30) days following entry of this Order, Petitioner shall file a Memorandum regarding the merits of Claim 1 (in part).

IT IS FURTHER ORDERED that no later than thirty (30) days following the filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits.

IT IS FURTHER ORDERED that no later than fifteen (15) days following the filing of Respondents' Response, Petitioner may file a Reply.

IT IS FURTHER ORDERED that Claims 1 (in part), 2, 3 (in part), 5 (in part), and 6(D) are procedurally barred.

IT IS FURTHER ORDERED that Claims 1 (in part), 3 (in part), 5 (in part), 6(B), and 6(F) are dismissed as not cognizable on federal habeas review.

IT IS FURTHER ORDERED that Claims 3 (in part), 4, 6(A) (in part), 6(C), and 7 are meritless and hereby denied with prejudice.

IT IS FURTHER ORDERED that Claims 6(A) (in part) and 6(E) are dismissed without prejudice as premature and not yet ripe for review.

IT IS FURTHER ORDERED that if, pursuant to Local Rule 1.10(p), Petitioner or Respondents file a Motion for Reconsideration of this Order, such motion shall be filed within fifteen (15) days of the filing of this Order. The filing and disposition of such motion does not toll the time for the filing of any merits brief scheduled under this Order.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 31st day of March, 2000.

s/Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge

Copies to all counsel of record.

APPENDIX F

_X_ FILED ___ LODGED
___RECEIVED ___ COPY
MAR 3 2005
CLERK U S DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Roger Mark Scott,	)	No. CV-97-1554-PHX-PGR
	)	
Petitioner,	)	DEATH PENALTY CASE
	)	
vs.	)	**MEMORANDUM OF**
	)	**DECISION AND ORDER**
Dora B. Schriro, et al.,[1]	)	
	)	
Respondents.	)	
	)	

Petitioner Roger Mark Scott ("Petitioner") seeks federal habeas relief from his 1991 murder conviction and resulting death sentence. (Dkt. 1.)[2] Petitioner filed an initial habeas petition on July 25, 1997, after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Accordingly, the provisions of the AEDPA apply to this case. Lindh v.

---

[1] Dora B. Schriro is substituted for her predecessor, Terry Stewart, as Director, Arizona Department of Corrections. Fed. R. Civ. P. 25(d)(1).

[2] "Dkt." Refers to documents in this Court's file.

Murphy, 521 U.S. 320, 336 (1997).

In a second amended petition filed on July 26, 1999, Petitioner raised seven claims, including numerous sub-claims. (Dkt.. 111.) In an order filed March 31, 2000, the Court determined that: portions of Claims 1, 3 and 5, and the whole of Claims 2 and 6(D) were procedurally barred; portions of Claims 1, 3 and 5, and the whole of Claims 6(B) and 6(F) were not cognizable for federal habeas relief; portions of Claims 3 and 6(A), and the whole of Claims 4, 6(C) and 7 were meritless; and a portion of Claim 6(A) and the whole of Claim 6(E) were premature and not yet ripe for review. (Dkt. 119.) The Court further determined that Petitioner is entitled to merits review only on a portion of Claim 1, which alleges ineffective assistance of counsel at sentencing ("IAC"). (Id.) In this Order, the Court addresses the merits of that claim and finds that Petitioner is not entitled to federal habeas corpus relief.

STANDARD OF LAW

Federal habeas relief may be granted to a state prisoner only if the prisoner demonstrates that his conviction and/or sentence were obtained in violation of the Constitution, laws or treaties of the United States See 28 U.S.C. § 2254(a) (1994). Under the AEDPA, § 2254(d), federal courts apply a more deferential standard of review to claims adjudicated on the merits in state court. See Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); Woodford v. Visciotti, 537 U.S. 19, 24

(2002) (per curiam). Under subsection (d)(1), habeas relief may be granted only if a state court's decision was "contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States . . . ."[3] 28 U.S.C. § 2254(d)(1) (Supp. 2004). "[C]learly established" federal law includes the holdings of the Supreme Court at the time a petitioner's state court conviction became final. See Williams v. Taylor, 529 U.S. 362, 365 (2000); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). A state court decision on the merits is "contrary to" clearly established federal law, if (1) "the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law," or (2) "the state court confronts facts that are materially indistinguishable from relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's]." Williams, 529 U.S. at 405. A state court decision on the merits constitutes an "unreasonable application" if the state court identifies the governing legal rule, but its application of the rule to the facts of a particular case is objectively unreasonable. Id. at 407-08.

Application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002), cert. denied, 539 U.S. 916 (2003); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000) ("Delgado II"). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. Himes, 336 F.3d at 853 ("The 'independent review' of the *record* required when a state court supplies no *ratio decidendi* must be carefully distinguished from 'independent review' of the *constitutional question* . . ."); Pirtle, 313 F.3d at 1167. Although the record is reviewed independently, a federal court still defers to the state court's ultimate decision. Pirtle, 313 F.3d at 1167 (citing Delgado II, 223 F.3d at 981-82; see also Himes, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be reviewed *de novo* because in that circumstance "there is no state court decision on [the] issue to which to accord deference" and concerns about "comity and federalism that arise when a state court reaches the merits [of a claim] do not exist." Pirtle, 313 F.3d at 1167 (following Third and Fifth Circuits); see also Nulph v. Cook, 333 F.3d 1052, 1056-57 (9th Cir. 2003); cf. Lewis v. Mayle, 2004 WL 2699900 *5 (9th Cir. 2004) (reviewing *de novo* whether defendant validly waived right to conflict-free counsel where state court did not decide the issue and denied IAC claim on other grounds). In any case to which the AEDPA applies, state court factual determinations are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (Supp. 2004).

---

[3] Petitioner does not seek habeas relief pursuant to 28 U.S.C. § 2254(d)(2). (See dkt 129 at 126-27.)

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of December 2, 1989, four-year-old Christopher Milke was reported missing from

Metrocenter, a Phoenix-area shopping mall, by James Styers, the roommate of Christopher's mother, Debra Milke, and Christopher's sometime-caretaker. Styers told mall security that Christopher disappeared while Styers was in a restroom stall. During the search for Christopher, Styers and a Sears employee approached Petitioner, a longtime acquaintance of Styers, and asked if he had seen Christopher. Petitioner answered "No," and claimed he had come to Metrocenter with an old friend. In the early morning hours of December 3, Styers told police for the first time that he and Christopher had spent time with Petitioner prior to going to Metrocenter and that they had dropped Petitioner off near his home.

Upon questioning by the police, Petitioner repeatedly denied involvement in Christopher's disappearance. After a detective challenged the truthfulness of his story, Petitioner admitted he was lying and said he had driven Styers and Christopher to a desert wash, where Styers shot Christopher three times. Petitioner claimed that about a week before the murder, Styers told him that he (Styers) and Debra Milke planned to kill her son and wanted Petitioner's help. He claimed that Milke said she wanted her son killed because she was not cut out to be a mother and she had a $5,000 insurance policy on his life. He also said she offered him $250 from the proceeds if he assisted Styers. After confessing, Petitioner led police to Christopher's body and told them where to find the gun, discarded cartridge shells, and tennis shoes worn by Styers at the time of the murder.

On February 7, 1991, a jury convicted Petitioner of kidnapping, conspiracy to commit murder and first degree murder. The trial judge sentenced Petitioner to death for the murder and to terms of imprisonment for the other counts. The Arizona Supreme Court affirmed. State v. Scott, 177 Ariz. 131, 865 P.2d 792 (1993); Thereafter , Petitioner sought post-conviction relief ("PCR") on just one claim–that counsel had been ineffective at sentencing. (Dkt. 131, ex. A at 3.) Following a hearing at which neither party presented evidence, the trial court denied the PCR petition. (Id., ex G at 3-7, ex. A at 3, ex. C at FOF 10.)[4] In October 1997, the Arizona Supreme Court summarily denied a petition for review from the denial of PCR relief. (Id., ex. E.) Thereafter, Petitioner commenced these proceedings.

DISCUSSION

In his habeas petition, Petitioner argues that trial counsel rendered ineffective assistance at sentencing in violation of his Sixth Amendment rights by failing to argue as mitigation a recommendation by the victim's father that Petitioner be shown leniency. The standard for an IAC claim is set forth in Strickland v. Washington, 466 U.S. 668 (1984), which requires a petitioner to show that counsel's performance was deficient and that the deficiency prejudiced his defense. To obtain habeas relief on his claim, Petitioner must show that the state court decision denying relief on the IAC claim was contrary to or involved an unreasonable application of Strickland. See 28 U.S.C. § 2254(d)

---

[4] "FOF" refers to the PCR court's findings of fact.

(Supp. 2004); Williams, 529 U.S. at 405.

Relevant State Proceedings

After the jury returned its verdict, the trial court set an aggravation and mitigation hearing pursuant to A.R.S. § 13-703(B) for April 5, 1991, and directed that a presentence report ("PSR") be prepared by the probation department. (ROA-PCR 457-58.)[5] Prior to completion of the PSR, defense counsel moved to seal the report until after the aggravation/mitigation hearing. (ROA-PCR 473.) Defense counsel argued that the PSR should not be considered in determining the existence of any aggravating factor because it would likely contain inadmissible information, such as Petitioner's prior arrests, which had not been proven at trial or in the § 13-703(C) hearing, and for which there were no dispositions.[6] (Id. at 1.) Finally, he argued that the PSR should be sealed because it would contain victim impact information that would infringe Petitioner's fundamental right to a fair hearing under Booth v. Maryland, 482 U.S. 496 (1987), if the court's review of unreliable information led it to impose a death sentence. (Id. at 3-4.)

---

[5] "ROA-PCR" refers to the seven-volume record on appeal from Petitioner's state post-conviction proceedings (Arizona Supreme Court No. CR-97-0179-PC). "RT" refers to reporter's transcript. The original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court. (See Dkt. 104.)

[6] At the time, A.R.S. § 13-703(C) provided that either party could present evidence with respect to mitigation regardless of its admissibility, but that admissibility of information relevant to establishing aggravating factors was governed by the Arizona Rules of Evidence.

The PSR was completed on March 27, 1991. The report included a section regarding the victim's father, Mark Milke, who:

> Advised that there is little question in his mind that his former wife initiated the conspiracy to have his son killed and that codefendant Styers was equally responsible for causing the son's death. Although Mr. Milke acknowledges Mr. Scott's involvement in this matter as an atrocious act, he does feel that, of the three defendants, Scott should be shown some leniency, as he did lead police to his son's body and was instrumental in solving this case. Mr. Milke commented that if his son's remains were never found, this incident would have proven to be an even greater tragedy. . . .

(Dkt. 131, ex. A at 3.) In addition, the PSR included recommendations from the victim's maternal and paternal grandfathers and one of the investigating detectives that Petitioner be sentenced to death. (Id. at 3-4.) The report also detailed Petitioner's lengthy history of unemployment and economic dependence on his mother (who subsisted on social security), and his prior arrests for burglary and larceny, petty theft, disorderly conduct, assault, public sexual indecency and driving while intoxicated. (Id. at 5-6.)

Prior to the start of the aggravation/mitigation hearing, the trial court held oral argument on the pending defense motions. With respect to the motion to seal the PSR, the judge told the parties that he had not yet read the report. (RT 4/5/91 at 21.) He explained his practice "would be not to read the presentence report until after the completion of the aggravation/mitigation hearing," but asked defense counsel whether counsel wanted him "to take that one step further and not read the presentence report until after I make my findings"? (Id.) Defense counsel, stating that he had read the PSR, argued that the judge should not read the report prior to making both aggravation *and* mitigation findings because it contained victim impact statements that were inadmissible. (Id. at 21-28.)

At two different points, the judge specifically asked defense counsel whether he believed it would be "proper for the Court to see the presentence report after aggravating circumstances have been either found or rejected, depending upon the case, but before mitigation is considered?" (Id. at 28-29, 23-24.) Both times defense counsel argued that the judge should not read the PSR until after he had determined the existence of aggravating *and* mitigating factors. (Id. at 28.) The court then asked:

> THE COURT: You may have thought that my question about reading the presentence report after making the findings regarding aggravation but before making them on mitigation was facetious. If was not meant to be facetious at all, and let me tell you why. I have had the experience of not knowing about

mitigating circumstances until I read the presentence report.

So I really have to ask you that question again. Are you saying or is it part of your argument that it would be proper for the Court to see the presentence report after aggravating circumstances have been either found or rejected, depending on the case, but before mitigation is considered?

MR. STEINLE: Judge, in that regard, see, I think we're just – see, how do I open the thing up and argue certain things about the problems that I see in this presentence report?

THE COURT: I don't want you to do that.

MR. STEINLE: I understand. But see, if you are going to say that you are going to make your findings in terms of aggravation and then read it, and I have some concerns about information contained in there, because when you get to mitigation what you have to do is look at the whole picture.

THE COURT: Sure.

MR. STEINLE: You may decide something isn't quite so mitigating based upon what you see in the report, but if I have some questions abut what that information is, how do I do it?

And so in other words, what I would have to do is, we would have to hold the aggravation hearing, the Court would have to make its

> findings, and then we would have to open the presentence report up and me say to the Judge, okay, I object to the following things in the presentence report for the following reasons and I ask that the Court not consider it in terms of deciding mitigation because I don't think that they are accurate or reliable or proper.
>
> So I think what we are doing is we are opening Pandora's box.
>
> I can indicate to the Court that one of the reasons I am so extensive in my mitigation memo is what I like to do is point out to the Court what I consider to be mitigation one way or the other, and so in effect – and I've gone over the presentence report, and I just would find it very hard to say to the Court, okay, well, don't consider it, but then go ahead and look at it, because in this case I have some real concerns about what's contained in the report.

(Id. at 29-30.) The judge then told the parties he considered the defense position to be that he should not read the PSR until after he had prepared the special verdict setting forth his findings of the aggravating and mitigating factors on the murder count. (Id. at 35.) After the motions were resolved, the parties presented their aggravation and mitigation evidence.

At oral argument on April 12, 1991, defense counsel conceded that the aggravating factor based on the victim's age was established, but vigorously argued against finding any other aggravating factors and for finding and giving weight to mitigating circumstances, including the absence of a prior felony record. (RT

4/12/91 at 68, 63-104.) Counsel did not urge consideration of Mark Milke's leniency request as a mitigating circumstance. (Id. at 63-104.) Following defense counsel's argument, the State asked that Mark Milke be permitted to address the Court regarding the non-death-eligible counts. (Id. at 104.) Defense counsel objected, stating:

> Judge, this is a 703 hearing and only has application to Count 1. If he's asking to be heard as to Counts 2 and 3, I ask that the Court reserve that until after the Court's done its special finding. It's not the appropriate time, it has nothing to do with any of the aggravating circumstances in this case, and therefore, I'm objecting.

(Id. at 105.) The court denied the prosecution request in order to avoid the "chance of any taint" arising from a failure to treat the capital count separately from the non-capital counts. (Id.)

The sentencing hearing on the capital and non-capital counts was held on April 22, 1991. Noting that the PSR had been disclosed to both counsel, the judge stated that he had "not read the Presentence Report until after hearing and considering the evidence and argument presented by both parties [on April 5 and 12, 1991]." (RT 4/22/91 at 4.) Mark Milke was then permitted to address the court and stated, "Sir, as to the three counts, up until now I think the score if fairly even; two heads for two hearts. This is a one-on-one matter, and I would like to see consecutive sentences run. That's all." (Id.) After affording Petitioner an opportunity to allocute, the judge announced his findings of aggravating factors and mitigating circumstances and sentenced Petitioner to death.[7]

As to aggravation, the judge found the existence of three separate factors: (1) that the murder was committed for pecuniary gain, A.R.S. § 13-703(F)(5); (2) that the murder was especially heinous and depraved based upon the senselessness and helplessness of the victim, A.R.S. § 13-703(F)(6); and (3) that the victim was a child less than fifteen years of age and Petitioner was an adult, A.R.S. § 13-703(F)(9). (Dkt. 131, ex. B. at 5-12.) As to mitigation, the judge found the existence of four circumstances: (1) Petitioner's assistance to law enforcement authorities; (2) Petitioner's conduct during incarceration; (3) the bond of love between Petitioner and his mother; and (4) Petitioner's psychological history/characteristics. (Id. at 12-19.) However, the judge rejected the absence of a prior felony conviction as a mitigating circumstance and determined that the mitigating circumstances were "not sufficiently substantial to call for leniency." (Id. at 13, 22.)

On direct appeal, the Arizona Supreme Court determined that the trial court had erred in concluding that the lack of a prior felony record did not constitute a mitigating circumstance. Scott, 177 Ariz. at 145, 865 P.2d at 806. Nevertheless, noting that "arrests or misdemeanor convictions may be considered when lack of felony convictions 'is advanced as a mitigating factor,'" the court determined that under the circumstances of the case, the additional mitigating circumstance had "minimal significance" and that the death penalty was appropriate. Id.

---

[7] Petitioner, Milke and Styers were each tried and convicted separately and subsequently sentenced to death by different judges. Milke and Styers were tried and sentenced prior to Petitioner's trial.

In PCR proceedings, Petitioner argued that trial counsel should have stressed Mark Milke's leniency request as a separate mitigating circumstance and that the failure to do so constituted IAC. The trial court scheduled an evidentiary hearing on this claim, but neither party presented evidence. (Dkt. 131, ex. G at 3-7, ex. C at FOF 10.) In its findings of fact, the court determined that Mark Milke had recommended a death sentence for Petitioner's co-defendants and that each had been sentenced to death. (Id. ex. C at FOF 4.) It further found that Milke's comments in the PSR were "in the nature of a request for leniency," which if proffered had to be considered in mitigation if related to Petitioner's character or the circumstances of the crime. (Id. ex. C at COL 2.)[8] It found that Milke's leniency request "was related to the circumstances of the offense (i.e., the Defendant's role in the crimes) and the assistance provided by the Defendant during the investigation." (Id.) The court rejected the State's contention that, because it had previously found Petitioner's assistance to authorities constituted mitigation, the request for leniency predicated on the same basis could not also constitute mitigation. (Id. at 3-4.) The court found that it had been unaware of the leniency request until after it had prepared the special sentencing verdict but that it had read the PSR before actually imposing a sentence. (Id. ex. C at FOF 6.) the court concluded that Milke's comments constituted mitigation but, without addressing whether trial counsel had performed deficiently, it concluded that under Strickland, Petitioner had failed to establish prejudice:

---

[8] "COL" refers to the PCR court's conclusions of law.

> Considering the totality of the evidence before this Court at sentencing, there is no reasonable probability that Defendant's sentence would have been different had trial counsel urged Mr. Milke's comments as mitigation. There is no basis whatsoever, much less a reasonable probability, for concluding that the additional mitigating circumstance would have altered this Court's conclusion that the mitigating circumstances were not sufficiently substantial to call for leniency.

(Id. at 5.)

Performance

To establish deficient performance under Strickland, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that counsel's representation fell below an objective standard of reasonableness "under prevailing professional norms." Strickland, 466 U.S. at 687-88. Further, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. The reasonableness of counsel's performance is considered under all the circumstances and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Counsel's performance is evaluated by what reasonable counsel would have done at that time, including an evaluation of state law sentencing strategies. See Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (stating that under California law, a defendant may provide evidence of "residual doubt" as to his guilt during the penalty phase). Where, as here, the state court adjudicated the merits of Petitioner's IAC claim without addressing counsel's performance, the Court conducts an independent review of the state record to assess whether it was objectively unreasonable to not find counsel's performance deficient. See Pirtle, 313 P.3d at 1168, n.4 (explaining that in Delgado II, independent review of record standard applied to prejudice prong of IAC claim dismissed on merits of counsel's performance); Avila v. Galaza, 297 F.3d 911, 921 (9th Cir. 2002), cert. dismissed as moot, 538 U.S. 919 (2003).

Petitioner argues that trial counsel performed deficiently by failing to present the leniency request as an additional mitigating circumstance. The failure to adequately investigate and present mitigating evidence can constitute deficient performance. See Wiggins v. Smith, 539 U.S. 510 (2003). However, defense "counsel need not present all available mitigating circumstance evidence in order for counsel's conduct to be deemed effective at the sentencing stage." Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004); see Bell v Cone, 535 U.S. 685, 697-700 (2002) (decision at sentencing not to recall or present certain witnesses not objectively unreasonable); see also Burger v. Kemp, 483 U.S. 776, 788-95 (1987) (counsel's strategic choice not to introduce mitigating evidence was supported by reasonable professional judgment when available evidence would not have been helpful in establishing mitigation); Darden v. Wainwright, 477 U.S. 168, 185-87 (1986) (counsel's decision to rely on plea for mercy and not to present potential mitigating evidence, including surviving victim who was opposed to the death penalty, was reasonable where potential mitigating evidence would have opened door to damaging evidence regarding petitioner's sociopathy and violent history).

The Court's independent review of the state court record does not support a finding that trial counsel failed to exercise reasonable professional judgment by not urging the leniency request as a mitigating circumstance at sentencing. Under Arizona law then, as now, proffered mitigation has to relate to the character of the defendant or the circumstances of the offense. See State v. Williams, 183 Ariz. 368, 385, 904 P.2d 437, 454 (1997) (holding that request from victim's family that defendant be sentenced to life imprisonment rather than death out of concern for family's grief irrelevant to either defendant's character or circumstances of crime and therefore not proper mitigation). In this case, the PCR court found that the leniency request did relate to the circumstances of the crime and found it mitigating. Nonetheless, counsel, in the exercise of his professional judgment, could have reasonably concluded that Mark Milke's sentencing views were either not mitigating or would be accorded little weight, and that Petitioner's assistance to authorities could be established by other evidence with fewer potentially adverse implications, as discussed below Indeed, the court concluded at sentencing that Petitioner's assistance to authorities constituted mitigation without reference to the PSR.

It further appears on the record that defense counsel made a strategic decision to attempt to limit or preclude consideration of the PSR by the trial court and, consistent with that strategy, did not urge the trial court to consider Mark Milke's capital sentencing recommendation, which was contained only in the PSR. It is reasonable not to introduce mitigating evidence when such evidence would be rebutted by other adverse evidence. See Darden, 477 U.S. at 185-87. Counsel twice declined the court's invitation to read the PSR before deciding which mitigating circumstances had been established. Counsel explained that he was concerned abut the contents of the PSR and its reliability, as well as the possible negative impact the PSR might have on the court's mitigation findings. The record supports the conclusion that trial counsel made a strategic decision to limit or preclude the court from reading the PSR prior to determining whether any of the mitigating circumstances had been established.

The Court also concludes that counsel's strategy to prevent the trial court from reviewing the PSR prior to determining the existence of aggravating and mitigating circumstances was reasonable. In addition to containing Mark Milke's recommendation for leniency, the PSR included recommendations for a sentence of death by other family members and an investigating detective. The detective emphasized Petitioner's failure to take any steps to prevent the murder, despite knowledge of the plan, as well as Petitioner's lack of remorse. The PSR also detailed Petitioner's multiple prior arrests. Further, the PSR included a summary of Petitioner's statement regarding the crime in which he minimized his role and responsibility, which was contradicted in part by evidence offered during the guilt phase, including Petitioner's own recorded statements to police. Under these circumstances, defense counsel could have reasonably concluded that the PSR, on balance, was more likely to harm than enhance Petitioner's prospects with respect to mitigation.

Furthermore, defense counsel could have reasonably apprehended that if Mark Milke's comments in the PSR were urged as a mitigating circumstance, the prosecutor might present testimony at the aggravation/mitigation hearing from Mark Milke to rebut any contention that his views were mitigating. The prosecutor's request that Mark Milke be permitted to address the court regarding the non-capital counts at the aggravation/mitigation hearing on the capital count, and defense counsel's objection thereto, suggest that Mark Milke was not willing to recommend leniency in sentencing on the murder count, or at least that he was at most only willing not to affirmatively recommend a death sentence. There is nothing in the record, then or since, to suggest that Mark Milke was prepared to appear on Petitioner's behalf at the aggravation/mitigation hearing. Thus, defense counsel may have reasonably concluded that he would open the door to adverse evidence relevant to mitigation if he urged the leniency request as a mitigating circumstance. In any event, the record supports the conclusion that the decision to limit or preclude the trial court's consideration of the PSR was a reasonable strategy at sentencing.

Prejudice

Even if counsel's performance was deficient, Petitioner has failed to establish that he was prejudiced by that performance. To establish prejudice under Strickland, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Under this prong, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. To establish prejudice, the Supreme Court has emphasized that assessing prejudice in the context of capital sentencing requires the reviewing court to "reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins, 539 U.S. at 534; see also Mayfield v. Woodford, 270 F.3d 915, 928 (9th Cir. 2001) (en banc).

Petitioner contends generally that the state court unreasonably applied Supreme Court law[9] by failing to consider all of the mitigating circumstances against the aggravating factors in assessing whether there was a reasonable probability of a different outcome had counsel urged the leniency request as mitigation. (Dkt. 129 at 26.) To find unreasonable application under § 2254(d)(1), this Court must conclude that the state court's determination that Petitioner was not prejudiced by counsel's performance constituted an objectively unreasonable application of Strickland to the facts of this case. See Williams, 529 U.S. at 407-408. Neither Petitioner's general nor specific contentions are supported by the record.

First, Petitioner argues that the state court failed to consider the additional mitigating circumstance found on direct appeal by the Arizona Supreme Court– absence of a prior felony conviction. Petitioner bases this contention on the PCR court's statement, in its order denying post-conviction relief, that it had considered "the totality of the evidence before this Court at sentencing" in determining that there was no reasonable probability Petitioner's sentence would have been different. This statement was not an assertion that the court did not consider the "lack of felony conviction" mitigating circumstance found by the supreme court on direct appeal. During sentencing, the trial court determined, *as a matter of law*, that absence of a prior felony conviction was not a mitigating circumstance. (RT 4/22/91 at 17.) The Arizona Supreme Court reversed the trial court's legal conclusion; the evidentiary basis for the circumstance was never at issue. See Scott, 177 Ariz. at 145, 865 P.2d at 806. Therefore, the PCR court's statement that it considered "the totality of the evidence . . . at sentencing" does not reflect that the court disregarded the evidence establishing Petitioner's lack of a prior felony conviction in determining whether Petitioner was prejudiced.

---

[9] Petitioner also argues that the state court's finding that he was not prejudiced by counsel's failure to urge the leniency request was "contrary to" clearly established federal law because prejudice should have been presumed under United States v. Cronic, 466 U.S. 648 (1984). (Dkt. 129 at 19.) In Cronic, the Court identified certain limited circumstances in which prejudice will be presumed. 466 U.S. at 659-61. The failure to argue a particular mitigating circumstance is not one of them. See Cone, 535 U.S. at 697-98.

Second, Petitioner argues that the PCR court's reference, in its order denying relief, to Petitioner's assistance to authorities, without mentioning other mitigating circumstances, indicates that the PCR court failed to consider these other mitigating circumstances. The Court finds that this statement does not reflect that the PCR court failed to consider those other mitigating circumstances in assessing prejudice. The court merely distinguished its previous finding–that Petitioner's cooperation with authorities was a mitigating circumstance–from the leniency request, which was based in part on Petitioner's cooperation with authorities. That is, the PCR court made clear that it gave the leniency request separate mitigating weight from the cooperation mitigator. Doing so does not give rise to an inference that the PCR court failed to consider the other mitigating circumstances found at sentencing or on direct appeal.

Third, Petitioner argues that "[i]f" the PCR court did not consider the absence of a prior felony conviction mitigator "during the re-weighing process, the re-weighing process would not comply with the constitutional requirements" under Eddings v. Oklahoma, 438 U.S. 586 (1978), and Lockett v. Ohio, 455 U.S. 104 (1982). (Dkt. 129 at 8.) Trial courts are presumed to know and apply the law. Walton v. Arizona, 497 U.S. 639, 653 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002); Beaty v. Stewart, 303 F.3d 975, 985 (9th Cir. 2002). In determining whether a petitioner has been prejudiced by counsel's failure to urge a mitigating circumstance at a capital sentencing, courts are required to weigh mitigating evidence against the aggravating evidence and determine whether there was a "reasonable probability that absent the errors, the sentencer–including an appellate court, to the extent that it independently reweighs the evidence–would have concluded that the balance of the aggravating and mitigating circumstances do not warrant death." Mayfield, 270 F.3d at 928; see Williams, 529 U.S. at 391-95. This Court presumes that the PCR court knew both that the Arizona Supreme Court had held that the absence of prior felony conviction was a mitigating circumstance and that it was required to consider all of the mitigating circumstances, including any found on direct appeal, against the aggravating factors in assessing prejudice. Indeed, the PCR court stated as much in its order denying relief. (Dkt. 131, ex. C at COL 5.)

Finally, Petitioner argues that the leniency request, considered with the absence of a prior felony conviction, had substantial weight such that it was unreasonable not to find prejudice. However, the Arizona Supreme Court determined on direct appeal that the absence of a prior felony conviction in this case carried little mitigation weight, Scott, 177 Ariz. at 145, 865 P.2d at 806, and the PCR court found that the addition of the leniency request as a mitigating circumstance provided "no basis whatsoever, much less a reasonable probability," of a different outcome (dkt. 131, ex. C at COL 5). Thus, neither circumstance was accorded significant weight by the state courts, and this Court cannot say that together they had substantial weight, as Petitioner argues. Further, this Court cannot say that the failure of the PCR court to accord that circumstance greater weight constituted an objectively unreasonable application of Strickland. Under the unreasonable application clause, a state court's application must be more than merely wrong, it must be objectively unreasonable. See, e.g., Cone, 535 U.S. at 694. In sum, the PCR court's determination that Petitioner was not prejudiced by counsel's alleged failure to urge the leniency request as mitigation did not constitute an objectively unreasonable application of Strickland.

CONCLUSION

Petitioner has not established that trial counsel rendered ineffective assistance at sentencing by failing to urge as a mitigating circumstance Mark Milke's leniency recommendation contained in the PSR. At sentencing, counsel made a strategic choice to limit or preclude consideration of the PSR prior to determination of aggravating and mitigating factors.

This decision was not unreasonable under the circumstances–the PSR contained adverse information, and, had the leniency request been urged as mitigation, the prosecutor would have been entitled to present otherwise inadmissible evidence in rebuttal. The Court further concludes that Petitioner has not established that the PCR court's determination that he was not prejudiced by counsel's failure to urge the leniency request was either contrary to, or an unreasonable application of, clearly established federal law as decided by the Supreme Court. Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

Based on the foregoing,

IT IS ORDERED that Petitioner's Second Amended Petition for Writ of Habeas Corpus (Dkt. 111) is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED that the stay of execution entered by this Court on September 27, 1997, is **VACATED**.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in accordance with this Order and shall send copies of this Order to all counsel of record, to Petitioner Roger Mark Scott and to the Capital Case Staff Attorney.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329

DATED this 2nd day of March ~~February~~, 2005.

s/______________________________
PAUL G. ROSENBLATT
Senior United States District Judge

APPENDIX G

RECEIVED
JUN 06 2000

_x_FILED ___LODGED
___RECEIVED ___COPY
JUN 06 2000
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Roger Mark Scott,) CV-97-1554-PHX-PGR
)
Petitioner,)
)
v.) **ORDER**
)
Terry Stewart, et al.,)
)
Respondents.)
)

Pending before the Court is Petitioner's Motion for Reconsideration of the Court's Order Dated March 31, 2000. (File doc. 124). Also pending is Petitioner's Motion to Continue Briefing. (File doc. 125).

STANDARD OF REVIEW

Motions for reconsideration are disfavored and are only appropriate if the Court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law."

School Dist. No 1J. Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, 512 U.S. 1236 (1994). A motion for reconsideration is not the place for the moving party to make new arguments not raised in its original briefs. Northwest Acceptance Corp. v. Lynnwood Equipment, Inc., 841 F.2d 918, 925-26 (9th Cir. 1988). Nor is it the time to ask the Court to rethink what it has already thought. United States v. Rezzonico, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998) (citing Above the Belt, Inc. v. Mel Bohannon Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983))

DISCUSSION

I. Statement of Background Facts

Petitioner asserts that "[t]he facts set froth in this Court's order as taken from the Arizona Supreme Court opinion do not fairly set forth Petitioner Scott's relationship to the co-defendants and to the charged crime." (File doc. 124 at 1). He then describes the facts which he contends were omitted from the procedural order.

Insofar as Petitioner suggests that the Court restricted its consideration of the relevant facts in this case to the factual determinations made by the Arizona courts, Petitioner is mistaken. The "Background" section of the procedural order is merely intended to provide just that: background.

Certainly, the Court must give utmost deference to the facts determined by the state court. Pursuant to 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct." When this Court reviews the merits of Petitioner's properly exhausted claim, Petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). If this Court determines that the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," then relief may be granted. 28 U.S.C. § 2254 (d)(2). Petitioner therefore continues to have the opportunity to rebut the factual findings of the state court.

II. Cause to Set Aside Default

Petitioner propounds several cause arguments in his Motion for Reconsideration. He renews his argument that cause exists to set aside the procedural default of his claims because (1) his post-conviction counsel was ineffective, and (2) the Rule 32 court and the Attorney General failed to intervene when it was apparent that his post-conviction counsel was not competent. He also, for the first time, asserts numerous additional cause arguments.

A. Ineffective Assistance of Post-Conviction Counsel

Petitioner urges that this Court reconsider relevant Ninth Circuit and Supreme Court precedent and find that there is a right to the effective assistance of post-conviction counsel under the Sixth and Fourteenth Amendments to the United States Constitution. It is not within the province of this

Court to overrule or disregard binding legal precedent from the Ninth Circuit and Supreme Court. The Court therefore declines Petitioner's request.

"[T]here is no constitutional right to effective assistance of counsel in habeas corpus cases." Bonin v. Calderon, 77 F.3d 1155, 1159 (9th Cir.), cert. denied, 516 U.S. 1143 (1996) (citing Coleman v. Thompson, 501 U.S. 722, 755 (1991), and Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). Likewise, there is no constitutional right to the effective assistance of post-conviction counsel. Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993). "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i).

"[C]ounsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." Coleman, 501 U.S. at 755. Because Petitioner was not entitled to the effective assistance of post-conviction counsel, any ineffectiveness on the part of his post-conviction counsel cannot constitute cause.

Petitioner argues that he was guaranteed the assistance of competent post-conviction counsel pursuant to Ariz. R. Crim. P. 32.4(c). He further argues that the comment to Ariz. R. Crim. P. 32.2(a)(3) (1992) demonstrates that there exists a right under Arizona law to the effective assistance of post-conviction counsel. The decision in State v. Mata, 185 Ariz. 319, 336, 916 P.2d 1035, 1052 (1996), belies that assertion. Even assuming that the Arizona rules of criminal procedure afforded Petitioner a right to competent counsel, such a right would not constitute a federal constitutional right.

Petitioner also insists that his right to the due process of law included the right to effective post-conviction counsel pursuant to Bonin, 999 F.2d at 429. Petitioner misconstrues Bonin. The Bonin court stated, in dicta, that in some complex cases, it may be necessary to appoint counsel pursuant to Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987). Bonin, 999 F.2d at 429. It also noted that Chaney "[does] not establish 'a due process right to counsel[,]'" nor does Chaney "purport to declare that due process demands the appointment of counsel[.]" 999 F.2d at 428, 429. The Bonin court clarified that "the absence or ineffectiveness of counsel does not in and of itself constitute a due process violation." Id. at 429. Like the Bonin court, this Court rejects Petitioner's "attempt to include Sixth Amendment rights within the Due Process Clause[.]" Id.

Petitioner has not demonstrated that this Court's determination that the alleged ineffectiveness of Petitioner's post-conviction counsel could not constitute cause was clearly erroneous or manifestly unjust, nor has he shown that an intervening change in the controlling law mandates a different result. According, the Court declines to reconsider its March 31, 2000 Order in this respect.

B. Psychological Difficulty Communicating with Post-Conviction Counsel

Petitioner contends that he had psychological difficulty in articulating his legal position to his post-conviction counsel and in attempting to assert his claims upon disagreement with post-conviction counsel. This cause argument was not asserted in either the Amended Traverse or Sur-Reply, and the Court will not review it at this time. See Northwest Acceptance Corp., 841 F.2d at 925-26 (motion for reconsideration not the place to raise new arguments).

C. The Rule 32 Court and the Attorney General Failed to Intervene

Petitioner also agues that cause exists because the Rule 32 court failed to intervene when it became aware of the difficulties in the attorney-client relationship between Petitioner and his post-conviction counsel. He asserts that "[b]oth the attorney general and the superior court judge had a responsibility to determine whether or not [Petitioner's post-conviction counsel] was truly acting on [Petitioner's] behalf." (File doc. 124 at 17). Petitioner cites no authority in support of this particular argument, which the Court expressly rejected in the March 31, 2000 Order. (Order of 3/31/00 at 12). Thus, Petitioner has failed to show that this Court's original determination that cause was not established was clearly erroneous or manifestly unjust. See ACandS, Inc., 5 F.3d at 1263.

D. Petitioner's Due Process Rights Were Violated

Petitioner appears to assert that cause exists to set aside the default because his due process rights were violated during the post-conviction proceedings. Specifically, he asserts that he had no lawyer acting on his behalf during the post-conviction proceedings and that his attempts to obtain new counsel were rebuffed by the Rule 32 court. Citing Coleman, 501 U.S. at 753, Petitioner claims that his post-conviction counsel was not acting as Petitioner's agent and that there is therefore no justification for holding Petitioner liable for the errors of his post-conviction counsel.

Petitioner misunderstands Coleman. The Supreme Court in Coleman explicitly held that a petitioner must bear the risk of attorney error based upon the attorney's ignorance or inadvertence and reasoned that the attorney is the agent of the petitioner "when acting, or failing to act, in furtherance of the litigation[.]" Id. (Emphasis added). When post-conviction counsel fails to fairly present claims of constitutional error to the state court, post-conviction counsel does not cease being an agent of the petitioner. Id. at 754. Although Petitioner's post-conviction counsel may, or may not, have been exemplary, there is no question that his post-conviction counsel provided him legal representation, and Petitioner does not dispute that his post-conviction counsel filed a petition for post-conviction relief on is behalf.

In his Amended Traverse, Petitioner argued that the Rule 32 court's "disregard for Petitioner's desperate pleas concerning counsel affected the basic framework of his post conviction proceedings violating his due process rights." (File doc. 115 at 28). Petitioner cited no controlling authority in support of that argument. Now, for the first time, Petitioner attempts to bolster that argument by asserting that the Rule 32 court denied him access to the courts when it did not appoint substitute post-conviction counsel earlier than it did. This new argument is not properly raised in a motion for reconsideration, and the Court declines to address it. See Northwest Acceptance Corp., 841 F.2d at 925-26.

III. Actual Innocence of the Death Penalty

Petitioner challenges the Court's determination that a fundamental miscarriage of justice was not demonstrated. He asserts that the Court should have held an evidentiary hearing to determine whether he was actually innocent of the death penalty.

In his Amended Traverse and Amended Sur-Reply, Petitioner summarily asserted that "there is a meritorious claim of innocence[.]" (File doc. 115 at 37; file doc. 117 at 8). Based upon Petitioner's meager assertions of innocence, it did not appear that an evidentiary hearing was required to determine whether a fundamental miscarriage of justice existed. See Rule 8, Rules Governing Habeas Corpus Cases under Section 2254 (Court shall determine, based upon review of proceedings and expanded record, whether an evidentiary hearing is necessary). The Court was able to determine that Petitioner failed to establish that he is innocent of the death penalty be clear and convincing evidence. See Sawyer v. Whitley, 505 U.S. 333, 336 (1992). Accordingly, the Court rejected Petitioner's assertion that a fundamental miscarriage of justice would occur if the Court did not review his procedurally defaulted claims. Petitioner has failed to show that the Court committed clear error, that its original decision was manifestly unjust, that there is an intervening change in controlling law, or that newly discovered evidence compels another look at this fundamental miscarriage of justice argument.

Petitioner sets forth two new fundamental miscarriage of justice arguments. First, he argues that he would not have been sentenced to death if his trial counsel had explained to the sentencing judge the dynamics of the relationship between Petitioner and his two co-defendants. He further argues that there is no reliable evidence that Petitioner participated in the crime for pecuniary gain. These new arguments are not properly asserted in a motion for reconsideration, and the Court will not consider them at this time. See Northwest Acceptance Corp., 841 F.2d at 925-26.

V. Evidentiary Hearing

Petitioner now asserts that the March 31, 2000 Order was premature "because the record does not fully and fairly address all of the factual issues" and that an evidentiary hearing is necessary. (File doc. 124 at 23). The Court disagrees. The Court's review of the pleadings and record in this case revealed no necessity for an evidentiary hearing on the "factual issues" at this stage of Petitioner's habeas proceedings. See Rule 8, Rules Governing Habeas Corpus Cases Under

Section 2254. When the Court reviews Petitioner's properly exhausted claim on the merits, the Court will reevaluate whether an evidentiary hearing is required.

In his Amended Traverse, Petitioner requested a hearing on "cause." (File doc. 115 at 28). Because the Court was able to determine that Petitioner had not established cause as a matter of law, Petitioner was not entitled to an evidentiary hearing on cause. See McClesky v. Zant, 499 U.S. 467, 494 (1991) ("The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard."). Petitioner also asked the Court to allow him "to present evidence to support his argument that prejudice exists." (File doc. 115 at 36). Because Petitioner failed to establish cause, the Court was not required to undertake a prejudice analysis. Petitioner has therefore failed to demonstrate that the Court's decision not to hold an evidentiary hearing on cause and prejudice was clearly erroneous or manifestly unjust.

VI. Motion to Continue Briefing

Petitioner asks that he be allowed at least thirty additional days to prepare his Memorandum regarding the merits of his properly exhausted claim. Respondents do not oppose this request. Accordingly, the Court will grant Petitioner's Motion to Continue Briefing.

IT IS THEREFORE ORDERED that Petitioner's Motion for Reconsideration of the Court's

Order Dated March 31, 2000 (file doc. 124.) is **DENIED.**

IT IS FURTHER ORDERED that Petitioner's Motion to Continue Briefing (file doc. 124) is **GRANTED.** Petitioner's Memorandum regarding the merits of Claim 1 (in part) shall be due no later than thirty (30) days from the date of this Order. No later than thirty (30) days following the filing of Petitioner's Memorandum, Respondents shall file a Response Re: Merits. No later than fifteen (15) days following the filing of Respondents' Response, Petitioner may file a Reply.

DATED this 6th day of June, 2000.

Paul G. Rosenblatt
United States District Judge

APPENDIX H

_X_FILED ___LODGED
____RECEIVED ___COPY
JUN 03 2005
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY s/__________DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Roger Mark Scott,
Petitioner,
vs.
Dora B. Schriro, et al.,
Respondents.

No. CV-97-1554-PHX-PGR

DEATH PENALTY CASE

ORDER RE: MOTION TO ALTER/AMEND AND RECONSIDER DENIAL OF HABEAS RELIEF

Pending before the Court is Petitioner's "Motion to Alter/Amend and Reconsider Denial of Habeas Relief concerning the Court's Memorandum of Decision and Order filed March 3, 2005. (Dkt. 149.)[1] A motion to alter or amend judgment may be treated as one for reconsideration where that is "the essence of the relief requested. Browder v. Dir. Dept of Corr. 434 U.S. 257, 262 n. 5 (1978); see also United States v. Dieter, 429

---

[1] "Dkt" refers to documents in this Court's file.

U.S. 6, 8-9 (1976). Generally, motions to reconsider are appropriate only if the court (1) is presented with newly discovered evidence, (2) committed clear error, or (3) there is an intervening change in controlling law. McDowell v. Calderon, 197 F. 3d 1253, 1255 (9th Cir. 1999) (en banc) (per curiam). A motion to reconsider is not the place for the moving party to make new arguments not raised in its original briefs. Northwest Acceptance Corp. v. Lynnwood Equip. Inc., 841 F.2d 918, 925-26 (9th Cir. 1988); see also Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001) (holding district court did not abuse its discretion by disregarding legal arguments and facts previously available but raised for the first time in a Rule 59(e) motion). Nor is it the time to ask the Court to rethink what it has already thought. United States v. Rezzonico, 32 F. Supp 2d 1112, 1116 (D. Ariz. 1998) (citing Above the Belt, Inc. v. Mel Bohannon Roofing, Inc. 99 F.R.D. 99, 101 (E.D. Va. 1983)); see Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985) (Rule 59(e) motion based on arguments previously raised properly denied). Petitioner does not seek reconsideration based on new evidence or a change in the law; therefore, the Court construes Petitioner's motion as seeking relief based solely on the ground of clear error.

As an initial matter, Petitioner asserts that the Court failed to address the merits of an appellate ineffective assistance of counsel ("IAC") claim. (Dkt. 149 at 4, 5.) Petitioner argues this claim was presented in his state post-conviction relief ("PCR") petition and is exhausted. (Id. at 5.) Petitioner is mistaken. The Court determined that all of

Petitioner's appellate IAC claims were properly defaulted because he failed to present them to the Arizona Supreme Court in his petition for review from the denial of post-conviction relief (dkt. 119 at 11). O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (finding that a petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner to exhaust); Baldwin v. Reese, 541 U.S. 27, 124 S. Ct. 1347, 1351 (2004) (explicit fair presentation must be made not only to the trial or post-conviction court, but to the state's highest court). The Court further concluded that Petitioner had established neither cause and prejudice nor a fundamental miscarriage of justice to excuse the default, rendering the claims procedurally barred from review on the merits. (Dkt. 119 At 12-13.) The Court subsequently denied Petitioner's motion for reconsideration in which he argued that ineffective assistance of PCR counsel established cause and prejudice to excuse the procedural default. (Dkts. 124, 126.) In the instant motion, Petitioner neither disputes that he failed to present his appellate IAC claims in his petition for review, nor that he failed to establish either cause and prejudice or a fundamental miscarriage of justice to excuse the default. Reconsideration regarding the procedural status of this claim will be denied.

Petitioner seeks reconsideration regarding the denial of relief on his one properly exhausted sentencing IAC claim. Petitioner presented one claim to the Arizona Supreme Court in his petition for review from the denial of state post-conviction relief: sentencing IAC based on counsel's failure to urge as mitigation the victim's *father's* leniency request, contained in the Pre-Sentence Report ("PSR"). That was the only claim properly before this Court for review on the merits. In the instant motion, Petitioner contends the Court erred by not considering and/or finding that counsel was ineffective for: (1) failing to urge the leniency requests of the victim's maternal aunt and paternal grandmother also contained in the PSR (dkt. 149 at 5, 9, 10-11, 12-15); (2) requesting that the trial court not review the PSR until after it had decided aggravating and mitigating factors (id. at 6, 7, 8-10); and (3) failing to conduct an adequate investigation of information contained in the PSR, including the leniency requests, from which counsel would have discovered evidence rebutting or explaining negative information in the PSR as well as additional available mitigating evidence (id. at 6, 7-8). These allegations were neither presented to this Court in the petition nor exhausted in state court. Reconsideration based on these new allegations will be denied.

Although not clearly articulated, Petitioner seeks reconsideration with respect to the Court's determination that counsel's performance was not deficient. Because the state court did not address counsel's performance, this Court conducted an independent review of the record to assess whether the state court was objectively unreasonable in not finding counsel's performance deficient.[2] First, the court noted that the failure to present all available mitigating evidence was not *per se* objectively unreasonable. (See dkt. 148 at 11.) Although Petitioner seemingly disagrees, he fails to cite any apposite controlling authority for this position. The Court determined that the record supported a finding that counsel exercised reasonable professional judgment in deciding not to urge the leniency request because he could have reasonably concluded that the leniency request would have been accorded little or no mitigating weight under state law. (See id.) Again, although Petitioner disagrees, he fails to cite apposite authority or evidence. The Court further determined that the record also supported a finding that trial counsel's decision was strategic. (See id. at 12.) Petitioner argues that counsel failed to conduct an adequate investigation before choosing that strategy. As discussed above, that issue was not presented in the petition before this Court or to the state court, and there is *no* evidence that counsel failed to conduct an adequate investigation.[3] Finally, the Court concluded that such a strategy was reasonable under the circumstances because the PSR contained significant negative information and defense counsel could have reasonably concluded that he would open the door to adverse evidence had he urged the leniency request as mitigation. (See id. at 12-13.) Petitioner argues that counsel's strategy was not reasonable because he failed to conduct an adequate investigation that would have revealed

---

[2] At one point in the instant motion, Petitioner erroneously refers to the state court as having concluded that counsel's decision not to urge the leniency request as a strategic decision. (Dkt. 149 at 21.) However, as noted herein and previously, the PCR court did (Continued)

(Continued)

not address counsel's performance at all.

[3] Absent a record regarding an attorney's decision-making, courts presume that the attorney exercised reasonable professional judgment. See Grossman v. Crosby, 359 F. Supp. 2d. 1233, 1252 (M.D. Fla. 2005) ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption of effective representation.")

evidence to rebut negative information in the PSR, as well as additional mitigation, and that members of the victim's family were willing to appear on Petitioner's behalf at the aggravation/mitigation hearing.[4] *No* evidence supports these assertions. Reconsideration regarding the performance prong of Petitioner's IAC claim will be denied.

Petitioner also argues that the Court erred in concluding that prejudice should not be presumed pursuant to United States v. Cronic, 466 U.S. 648, 659-61 (1984), contending that counsel failed to subject the prosecution's case at sentencing to meaningful adversarial testing. (Dkt. 149 at 25-29.) Petitioner merely reiterates arguments rejected by the Court; that is not a proper basis for reconsideration.[5] Rezzonico, 32 F. Supp. 2d. at 1116. Reconsideration on this basis will be denied.

---

[4] Petitioner asserts the Court "misrepresent[ed] the record" in finding that counsel's decision not to urge the leniency request was strategic to the extent it was based on the Court's determination that there was "'nothing in the record ... to suggest that Mark Milke was prepared to appear on Petitioner's behalf at the aggravation/mitigation hearing.'" (Dkt. 149 at 12, 23.) The Court disagrees. The prosecutor's request that Milke be permitted to address the court regarding the *non*-capital counts at the aggravation/mitigation hearing, and defense counsel's objection thereto, suggest that Milke was at most only willing not to affirmatively recommend a death sentence at the aggravation/mitigation hearing. (See dkt. 148 at 13.) Milke's statement on the non-capital counts does not alter that assessment.

[5] Contrary to Petitioner's contention, trial counsel did not completely fail to subject the prosecution's case to adversarial testing. Trial counsel filed numerous motions challenging Arizona's sentencing scheme and specific aggravating factors, as well as a lengthy sentencing memorandum urging the court to find and give weight to various mitigation evidence.

Petitioner challenges the Court's conclusion that the state court's prejudice finding was not an objectively unreasonable application of clearly established federal law. He argues that in assessing prejudice the state court failed to properly reweigh the aggravating and mitigating circumstances: (1) by according too much weight under state law to two of the three aggravating circumstances; (2) by failing to consider all mitigation cumulatively; and (3) by according insufficient weight to mitigating evidence. These allegations either repeat arguments rejected as meritless by the Court or constitute new arguments not previously raised. Reconsideration on these grounds will be denied.

Petitioner also argues that the state court unreasonably applied clearly established federal law by failing to consider his dysfunctional childhood as mitigation and to accord significant mitigating weight to his psychological history, absent a showing of a causal connection or nexus to the crime, which he contends violates the holding in Tennard v. Dretke, 124 S. Ct. 2562 (2004). (Dkt. 149 at 16, 24, 35.) Tennard, in relevant part, stands for the principle that courts may not impose minimum thresholds before the sentencer can consider evidence relevant to mitigation of the sentence. 124 S. Ct. at 2570-72. Thus Tennard advances the principles established in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), that a state may not preclude consideration of, and a sentencer may not refuse to consider, any proffered mitigation relevant to a defendant's character or the circumstances of the offense. Petitioner did not argue in his briefs that the state court refused to consider relevant mitigating evidence absent a causal connection or nexus to the crime in assessing prejudice. A motion to reconsider is not the place to raise new arguments for the first time. See Northwest Acceptance Corp., 841 F.2d at 925-26; see also Zimmerman, 255 F.3d at 740. Reconsideration on this ground will be denied.

The Court concludes that Petitioner has failed to articulate grounds to grant reconsideration of the denial of habeas relief. Petitioner's motion to alter or amend will be denied.

Accordingly,

IT IS ORDERED that Petitioner's Motion to Alter/Amend and Reconsider Denial of Habeas Relief is **DENIED.** (Dkt. 149.)

DATED this 4th day of June, 2005.

s/______________________________
PAUL G. ROSENBLATT
Senior United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Roger Mark Scott,	No. CV-97-1554-PHX-PGR
Petitioner,	DEATH PENALTY CASE
vs.	**ORDER**
Dora B. Schriro, et al.,[1]	
Respondents.	

Pending before the Court is Petitioner's Motion for Leave to File motion for Relief from Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (Dkt. 173.) Respondents have filed a motion in opposition (Dkt. 174), to which Petitioner has filed a reply (Dkt. 175). For the reasons set forth herein, Petitioner's motion is denied.

BACKGROUND

On July 25, 1997, Petitioner filed a preliminary petition for writ of habeas corpus and application for appointment of counsel. (Dkt. 1.) The Court appointed Robert Hirsch to represent Petitioner (Dkt. 2) and

---

[1] Dora B Schriro is substituted for her predecessor, Terry Stewart, as Director, Arizona Department of Corrections. Fed. R. Civ. P. 25(d)(1).

Carla Ryan to serve as co-counsel (Dkt. 8). On May 5, 1998, Petitioner filed an amended petition asserting six grounds for habeas relief. (Dkts. 53, 54.) The Court determined that all but one of the claims was procedurally defaulted. (Dkts. 119, 126.) On April 15, 2005, the Court granted Mr. Hirsch's motion to withdraw, appointed Ms. Ryan lead counsel, and denied their motion to appoint new co-counsel. (Dkt. 151.) The Court subsequently denied Ms. Ryan's motion to reconsider its order denying the appointment of co-counsel and her motion to withdraw. (Dkt. 154; *see* Dkt. 166.) The Court dismissed the remaining habeas claim on the merits (Dkt. 148), and, on July 5, 2005, entered judgment denying Petitioner's amended habeas petition. (Dkt. 157.) Petitioner filed a motion for reconsideration, which the Court denied. (Dkt. 154.) Petitioner then applied for a certificate of appealability, which the Court granted in part. (Dkt. 168.) Petitioner filed a notice of appeal on October 4, 2005. (Dkt. 169.) On November 17, 2005, the Ninth Circuit granted Ms. Ryan's motion to withdraw.[2] (Dkt. 171.) On December 12, 2005, the Court appointed Michael Burke of the Federal Public Defender's Office to represent Petitioner. (Dkt. 172.)

DISCUSSION

Because the filing of a notice of appeal divests the district court of jurisdiction to consider a motion for relief from judgment, *Gould v. Mut. Life Ins. Co. of*

---

[2] Petitioner indicates that the Ninth Circuit has granted his motion to unseal Ms. Ryan's motion to withdraw. (Dkt. 175 at 2, n.2.)

New York, 790 F.2d 769, 772 (9th Cir. 1986), Petitioner has filed his motion in accordance with the procedure outlilned by the Ninth Circuit: "To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case." *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004) (internal quotations omitted); *see Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992).

Petitioner inquires whether this Court would entertain or grant a motion for relief pursuant to Rule 60(b)(6). Petitioner contends that he is entitled to such relief because "the integrity of his federal habeas proceeding was grossly compromised by the failure and/or inability of his habeas counsel to provide meaningful assistance in litigating Petitioner's constitutional claims." (Dkt. 173, Mem. At 3.) Specifically, Petitioner asserts that habeas counsel "failed to raise several constitutional claims that Petitioner had previously exhausted in his state court proceedings." (*Id.* at 5.)

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. *See* Fed. R. Civ. P. 60(b).

In *Gonzales v. Crosby*, 545 U.S. 524, ___, 125 S. Ct. 2641, 2646 (2005), the Supreme Court held that Rule 60(b) applies in the habeas context to the extent that it is "not inconsistent with" applicable federal statutes, including the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). As outlined below, two provisions of the AEDPA prevent Petitioner from obtaining relief under Rule 60(b). First, the AEDPA prohibits successive habeas petitions. 28 U.S.C. §2244(b). Second, the AEDPA specifically mandates that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i); *see Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005).

As the *Gonzalez* Court explained, a Rule 60(b) motion constitutes a second or successive habeas petition when it "seeks vindication of" or "advances" one or more "claims." 125 S. Ct. at 2647-48. A claim is defined as "an asserted federal basis for relief from a state court's judgment of conviction"; a motion brings a claim "if it attacks the federal court's previous resolution of a claim *on the merits*." *Id.* at 2648. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 2648 n.4. An appropriate Rule 60(b) motion, the *Gonzalez* Court explained, "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Id.* at 2648.

Petitioner argues that his claim of ineffective assistance of habeas counsel constitutes an attack on the integrity of the habeas proceedings and is therefore a basis for a proper motion under Rule 60(b). The Court disagrees.

In *Gonzalez*, the Supreme Court specifically noted that "an attack based on the movant's own conduct, or his *habeas counsel's omissions* . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* at 2648 n.5 (emphasis added). Similarly, in *Post v. Bradshaw*, the Sixth Circuit held that a Rule 60(b) motion alleging ineffective assistance of habeas counsel should be construed as a second or successive habeas petition. 422 F.3d at 424-25. In ruling that the petitioner's Rule 60(b) motion was actually a second or successive habeas petition, the Sixth Circuit explained:

> It makes no difference that the motion itself does not attack the district court's substantive analysis of those claims but, instead, purports to raise a defect in the integrity of the habeas proceedings, namely his counsel's failure – after obtaining leave to pursue discovery – actually to undertake that discovery; all that matters is that Post is "seek[ing] vindication of" or "advanc[ing]" a claim by taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition.

Id. (quoting *Gonzalez*, 125 S. Ct. at 2647-48).

Similarly, in *Gray v. Mullin*, 171 Fed. Appx. 741, 742 (10th Cir. 2006), where habeas counsel had failed to provide the full state court record to the district court, causing the court to deny the petitioner's ineffective assistance claim, the petitioner asserted that his Rule 60(b) motion did not constitute a successive petition under *Gonzalez* but was an attack on the integrity of the habeas proceeding. The Tenth Circuit disagreed, concluding that the motion reasserted a substantive claim after the federal court had already ruled on the merits, the motion therefore constituted a successive petition. *Id.* at 743-44; *see also Cooey v. Bradshaw*, 2005 WL 1965966 at *7 (N.D.Ohio 2005) ("*Cooey II*") (Rule 60(B) motion alleging inadequacy of habeas counsel did not, as the petitioner contended, "impugn the integrity of the prior habeas proceeding" but sought instead "a re-litigation of the habeas claims he initially raised in the petition"); *Gurry v. McDaniel*, 149 Fed.Appx. 593, 596 (9th Cir. 2005) (60(b) motion was barred as a successive habeas petition, where the motion was based on the allegedly ineffective assistance provided by previous habeas counsel).

Like the petitioners in *Post*, *Gray*, *Cooey*, and *Gurry*, Petitioner, through his Rule 60(b) motion, "seeks leave to argue the merits of constitutional claims inadequately presented in or omitted from his previous habeas petition."[3] *Gurry v. McDaniel*, 149

---

[3] Petitioner argues that the Gonzalez Court's categorization of motions based upon "habeas counsel's omissions" as attacks on the merits of a petitioner's claims, as opposed to the integrity of the
(Continued)

Fed.Appx. at 596. Petitioner's motion, therefore, "although labeled a Rule 60(B) motion, is in substance a successive habeas petition." *Id.* (quoting *Gonzalez* 125 S. Ct. at 2647); *see Post*, 422 F.3d at 425 (the fact that petitioner's motion does not directly assert substantive claims is irrelevant). Because Petitioner has not satisfied any of the requirements set forth in 28 U.S.C. § 2244(b), this Court lacks jurisdiction to adjudicate his successive petition.

In addition, the AEDPA specifically prohibits relief based upon ineffective assistance of habeas counsel. 28 U.S.C. § 2254(i). As noted above, in *Post* the petitioner asserted that his habeas attorneys were ineffective because they failed to undertake discovery after obtaining permission to do so from the district court. Along with finding that the motion was forbidden as a successive petition, the Sixth Circuit explained that a Rule 60(b) motion is a proceeding "arising under" 28 U.S.C. § 2254. *Post*, 422 F.3d at 422-23. Therefore, according to *Post*, an allegation of ineffective assistance of habeas counsel is barred from review pursuant to § 2254(i). *Id.*

Finally, Petitioner contends that he has a statutory right to effective habeas counsel pursuant to 18 U.S.C. §§ 3599(a)(2) and (e) (formerly 21 U.S.C. §§ 848

(Continued).

proceedings, does not apply to capital cases. However, the courts in *Post* and *Cooey*, both capital cases, explicitly applied Gonzalez's analysis to reject Rule 60(b) motions based upon ineffectiveness of habeas counsel.

(q)(4)(B) and (8)).[4] The Court disagrees.

Tellingly, the only support Petitioner cites for the proposition that he has a statutory right to effective habeas counsel is a discussion in *Cooey v. Bradshaw*, 216 F.R.D. 408, 417 (N.D.Ohio 2003) ("*Cooey I*"). There, the district court granted the petitioner's motion for a stay of execution but *deferred* ruling on his Rule 60(b) motion."[5] *Id.* at 409. In the passage relied upon by Petitioner, the court, reflecting on a petitioner's right to qualified habeas counsel under §§ 848(q)(4)(B) and (8), described competent habeas counsel as "a vital part of the review process for capital cases" and a means of protecting the integrity of the habeas proceedings. *Id.* at 415.

---

[4] Petitioner acknowledges that there is no constitutional right to habeas counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991).

[5] The district court's recognition of the significance of competent capital habeas representation occurred in unique circumstances. The petitioner's Rule 60(b) motion was filed two days before his scheduled execution. Six weeks prior to the petitioner's scheduled execution, the Sixth Circuit dismissed his habeas counsel on the grounds of incompetence. *Cooey I*, 216 F.R.D. at 410. Therefore, as the district court noted, the petitioner was without counsel "in the critical period leading up to his execution." *Id.* at 416.

It is clear that the exigencies which prompted the *Cooey* court's discussion of a statutory right to effective habeas counsel distinguish that case from Petitioner's. As noted above, Petitioner was represented by two attorneys throughout the habeas proceedings, with Ms. Ryan, the attorney whose performance Petitioner attacks, serving as co-counsel until 2005, seven years after the amended petition was filed.

Ultimately, the *Cooey* court ruled on the petitioner's Rule 60(b) motion after the decisions in *Gonzalez* and *Post* had been handed down. Based upon those rulings, the court determined that it must deny the petitioner's motion. *Cooey II*, 2005 WL 1965966 at *8. The district court thereby rejected the very argument Petitioner cites it as supporting.

Because the AEDPA prohibits relief for ineffective representation in post-conviction collateral review and for claims adjudicated in a previous habeas petition, the Court concludes that Petitioner's motion for leave to file a Rule 60(b) motion must be denied.[6]

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's Motion for Leave to File Motion for Relief from Judgment Pursuant to Rule 60(b)(6) (Dkt. 173) is **DENIED.**

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to the Clerk of the Ninth Circuit Court of Appeals.

---

[6] In his reply, Petitioner distinguishes between his request for leave to file a Rule 60(b) motion and the Rule 60(b) motion itself, contending that this Court lacks the authority to consider the merits of the latter when addressing the former. (Dkt. 175 at 3.) Petitioner cites no authority for this proposition, and the Court rejects it as specious. The process outlined in *Williams*, 384 F.3d at 586, by which the district court is directed to decide whether it "wishes to entertain the [Rule 60(b)] motion, or to grant it," would be meaningless if the district court were prohibited from evaluating the underlying merits of the motion.

DATED this 23rd day of October, 2006.

s/________________________
Paul G. Rosenblatt
United States District Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Roger Mark Scott, Petitioner,	No. CV-97-1554-PHX-PGR DEATH PENALTY CASE
v.	**ORDER**
Dora Schriro, et al., Respondents.	

Pending before the Court is Petitioner's motion for reconsideration. (Dkt. 177.) Petitioner asks the Court to reconsider its Order denying Petitioner's motion for leave to file a Rule 60(b) motion. In that motion, Petitioner inquired, under the procedure outlined in *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004), whether the Court wished to entertain or grant his 60(b) motion. (Dkt. 173.) For the reasons set forth below, the Court will not reconsider its conclusion that it is unwilling to entertain or grant Petitioner's Rule 60(b) motion.

Motions for reconsideration are disfavored and appropriate only if the court is presented with newly discovered evidence, if there is an intervening change in controlling law, or if the court committed clear error. *McDowell v. Calderon*, [illegible]97 F.3d 1253, 1255 (9th Cir.

1999) (per curiam); *see School Dist. No. 1J, Multnomah County, Or. V. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not a forum for the moving party to make new arguments not raised in its original briefs, *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 925-926 (9th Cir. 1988), nor is it the time to ask the court to "rethink what it has already thought through," *United States v. Rezzonico*, 32 F. Supp.2d 1112, 1116 (D. Ariz. 1998) (quotation omitted).

In support of his motion for reconsideration, Petitioner has neither presented new evidence nor cited an intervening change in the law. Instead, he argues that the Court clearly erred in its analysis. The Court disagrees.

Petitioner contends that in assessing its willingness to entertain a Rule 60(b) motion, a district court is forbidden from considering the merits of the underlying motion and that, because this Court considered the merits of his 60(b) motion, its Order declining to entertain the motion actually constituted a ruling on the merits and thus exceeded the Court's jurisdiction. Petitioner provides no authority to support this assertion, and makes the argument despite the fact that his motion seeking leave to file a Rule 60(b) motion was supported entirely by the purported merits of the Rule 60(b) motion itself. (*See* Dkt. 173, Ex. 2, Motion for Relief from Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.) Relevant case law supports only contrary propositions; i.e., that a "district court order declining to entertain or grant a Rule 60(b) Motion is a procedural ruling and not a determination on the merits," *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir.2000), and that when asked if they are willing to entertain a Rule 60(b) motion district courts can and do consider the merits of the underlying motion, *see, e.g., Miller v. Marriott Int'l, Inc.*, 300 F.3d 1061, 1064 (9th Cir. 2002); *United States v. Tanoue*, 165 F.R.D. 96, 99 (D. Hawaii 1995). It is self-evident that elimination of the merits of the underlying motion as criteria upon which the Court can rely in determining whether it wishes to entertain – or ***grant*** – such a motion eliminates any rational basis for the court's decision.

Petitioner's other critique of the Court's Order relates to the cases discussed by the Court. The Court's ruling was based upon the analysis supplied by the United States Supreme Court in *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005), and subsequently applied by various courts, including the Ninth Circuit. The Court did not address Petitioner's contention that his argument for a statutory right to effective habeas counsel finds support in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003),[1] because the *Rohan* holding, to the extent that it has any relevance to the issue that forms the substantive basis of Petitioner's Rule 60(b) motion, is unpersuasive in the light of *Gonzalez* and 28 U.S.C. § 2254(i).

Accordingly,

---

[1] *Rohan* held that the statutory right to habeas counsel implies a right to competence on the part of the petitioner. 334 F.3d at 813.

IT IS HEREBY ORDERED denying Petitioner's motion for reconsideration (Dkt. 177).

DATED this 13th day of Novembers, 2006.

s/____________________
Paul G. Rosenblatt
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Roger Mark Scott,) No. CV 97-1554-PHX-PGR
)
Petitioner,) DEATH PENALTY CASE
)
vs.)
) **ORDER**
Dora B. Schriro, et al.,)
)
Respondents.)
)

Before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (Dkt. 180.) Respondents have filed a motion in opposition (Dkt. 182), to which Petitioner has filed a reply (Dkt. 187). For the reasons set forth herein, Petitioner's motion is denied.

BACKGROUND

On July 25, 1997, Petitioner filed a preliminary petition for writ of habeas corpus and application for appointment of counsel. (Dkt. 1.) The Court appointed Robert Hirsch to represent Petitioner (Dkt. 2) and Carla Ryan to serve as co-counsel (Dkt. 8). On May 5, 1998, Petitioner filed an amended petition for habeas relief. (Dkts. 53, 54.) On July 26, 1999, Petitioner filed a second amended petition, raising seven claims, together with numerous subclaims; the petition was supported by a 95-page memorandum. (Dkts. 111, 112.) The court determined that all but one of Petitioner's claims was procedurally defaulted. (Dkts. 119, 126.) Petitioner filed a motion to reconsider (Dkt. 135), which the Court denied (Dkt. 144). After briefing on the merits, the Court dismissed the remaining habeas claim (Dkt. 148), and, on July 5, 2005, entered judgment denying the habeas petition (Dkt. 157). Petitioner filed a motion to reconsider (Dkt. 149), which the Court denied (Dkt. 153). Petitioner then filed a 90-page application for a certificate of appealability (Dkt. 163), which the Court granted in part. (Dkt. 168.) Petitioner filed a notice of appeal on October 4, 2005. (Dkt. 169).

On April 15, 2005, the Court granted Mr. Hirsch's motion to withdraw, appointed Ms. Ryan lead counsel, and denied their motion to appoint new co-counsel.[1] (Dkt. 151.) The Court subsequently denied

---

[1] In denying Ms. Ryan's motion to withdraw, the Court noted:

> While second counsel may be appointed in federal capital habeas cases, Petitioner fails to present persuasive reasons to appoint second counsel *at this juncture* in the case. Ms. Ryan has been counsel for Petitioner since 1997. Furthermore, she has been substantially involved in briefing both the procedural posture and merits of Petitioner's claims. In addition, she has already filed a motion to alter or amend or to reconsider the denial of habeas relief.

(Dkt. 151 at 1-2.) In its subsequent order, the Court further

(Continued)

Ms. Ryan's motion to reconsider its order denying the appointment of co-counsel and her motion to withdraw. (Dkts. 154, 166.) On November 17, 2005, the Ninth Circuit granted Ms. Ryan's motion to withdraw. (Dkt. 171.) The Court appointed the Federal Public Defender's Office to represent Petitioner. (Dkt. 172.)

On September 27, 2006, Petitioner filed a motion seeking leave to file a Rule 60(b) motion. (Dkt. 173). The Court denied the motion and also denied Petitioner's motion for reconsideration. (Dkts. 176, 178.) On February 22, 2007, the Ninth Circuit Court of Appeals ordered this Court to entertain the merits of Petitioner's 60(b) motion. (Dkt. 179.)

DISCUSSION

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several enumerated grounds, including the catch-all category "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). Petitioner contends that he is entitled to relief pursuant to Rule 60(b)(6) because "the integrity of his federal habeas proceeding was grossly compromised by the failure and/or inability of his habeas counsel to provide meaningful assistance in litigating Petitioner's constitutional claims." (Dkt. 180 at 1.) Specifically,

---

(Continued)

explained: "In her motion, Ms. Ryan asserts that she cannot competently represent Petitioner without co-counsel. However, Ms. Ryan has performed the vast majority of the work in this case to date. In addition, she has extensive experience in capital habeas litigation." (Dkt. 154 at 1.)

Petitioner asserts that habeas counsel failed to raise a number of claims that he had properly exhausted in state court (*id.* at 5) and that counsel failed to pursue evidence that Petitioner suffers from neurological deficits (*id.* at 8-9).

In its previous orders, this Court explained that according to the United States Supreme Court in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and circuit cases interpreting the *Gonzalez* holding, *see, e.g., Post v. Bradshaw*, 422 F.3d 419, 423 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1621 (2006); *Gray v. Mullin*, 171 Fed.Appx. 741, 742 (10th Cir.), *cert denied*, *Gray v. Dinwiddie*, 127 S. Ct. 233 (2006); *Gurry v. McDaniel*, 149 Fed.Appx. 593, 596 (9th Cir. 2005); *see also Cooey v. Bradshaw*, 2005 WL 1965966 at *7 (N.D. Ohio 2005), ineffectiveness of habeas counsel is not a ground for relief under Rule 60(b)(6). The Court will not repeat that analysis beyond what is necessary to address the argument which is the focus of the pending motion: that "[Petitioner] was denied the meaningful assistance of counsel guaranteed him by 21 U.S.C. §§ 848(q)(4)(B) and 848(q)(8)."[2] (Dkt. 180 at 4.)

Petitioner asserts that he has a statutory right to "competent" habeas counsel; that the right was violated by habeas counsel's deficient performance; and that this violation entitles him to relief under Rule 60(b)(6). The right to competent or effective habeas counsel is not supported by the statutory provisions cited by Petitioner, which simply set a standard of qualification based on experience and are silent on the issue of counsel's actual performance.[3] Nor is such a right supported by the AEDPA (the Antiterrorism and Effective Death Penalty Act of 1996), which, pursuant to 28 U.S.C. § 2254(i), specifically prohibits relief based upon ineffective assistance of habeas counsel.

---

[2] These provisions are now codified at 18 U.S.C. §§ 3599(a)(2) and (e).

Section 2254(i) provides that "ineffectiveness or incompetence of counsel during Federal or State post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Petitioner contends that the statute does not apply to his motion because he is not seeking relief from conviction or sentence. (Dkt. 187 at 5-6.) This argument is entirely unconvincing. Through his 60(b)(6) motion, Petitioner seeks relief from this Court's denial of his habeas petition, by which he challenged his conviction and sentence. As the Sixth Circuit explained in applying § 2254(i) to reject a habeas petitioner's Rule 60(b)(6) motion, "The language of this statute is clear. It expressly bars relief based on claims of incompetent or ineffective counsel in federal post-conviction relief." *Post*, 422 F.3d at 423. The court further noted, contrary to Petitioner's assertion, that § 2254(i) "bars 'relief,' not simply particular kinds of relief, such as a writ of habeas corpus." *Id.*

---

[3] Sections 3599(a)(2) and 3599(e) provide, in relevant part:

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys. . .

> (e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings . . .

In addition, § 3599(c) sets forth the required qualifications for counsel:

> (c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

Petitioner's argument for a right to effective habeas counsel likewise finds no support in case law. As previously noted, in *Gonzalez* the United States Supreme Court explained that "an attack based on the movant's own conduct, or his *habeas counsel's omissions* . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." 545 U.S. at 532 n.5 (emphasis added). Therefore, a claim for relief under Rule 60(b) which relies on an assertion of ineffectiveness of habeas counsel constitutes a second or successive petition which must satisfy the requirements set forth in 28 U.S.C. § 2244(b). *See Post*, 422 F.3d at 424-25; *Gray*, 171 Fed.Appx. at 743-44; *Gurry*, 149 Fed.Appx. at 596; *Coocy*, 2005 WL 1965966 at *7. Although Petitioner purports to allege only that these habeas proceedings have lacked integrity due to habeas counsels' poor performance, in reality he seeks an opportunity to present his claims again and, presumably, to add the claims that previous habeas counsel omitted. Thus, "in substance," Petitioner's 60(b) motion is clearly "a successive petition and should be treated as such." *Gonzalez*, 524 U.S. at 531.

Petitioner contends, however, that the Supreme Court's use of the adverb "ordinarily" operates to exclude capital cases from the principle that relief sought on the grounds of habeas counsel's performance is not an attack on the integrity of the proceedings but constitutes an attempt to have merits of his claims re-evaluated.[4] Petitioner cites no authority for this interpretation, and no other court has adopted it. In fact, as this Court previously noted, both *Post* and *Cooey* are capital cases in which the courts explicitly applied *Gonzalez's* analysis to reject Rule 60(b) motions based upon ineffectiveness of habeas counsel.

Finally, even if the Court were to concede, contrary to the authority discussed above, that ineffective performance by habeas counsel could undermine the integrity of the habeas proceedings, such that Petitioner's Rule 60(b) motion does not constitute a second or successive petition, the complained-of conduct by petitioner's counsel does not meet that standard. For example, in a case decided prior to the ruling in *Gonzalez*, the Second Circuit denied the petitioner's request for relief under 60(b) based on habeas counsel's performance. *Harris v. United States*, 367 F.3d 74 (2d Cir. 2004). The court held that counsel's failure to raise certain claims – a failure which counsel himself was willing to swear constituted ineffective assistance – did not undermine the integrity of the proceedings because counsel's performance did not reach a level of deficiency that could be deemed "abandonment" of the petitioner's case. *Id.* at 81-82. The court then explained that to prove abandonment, "a Rule 60(b)(6) movant must show that his lawyer agreed to prosecute a habeas petitioner's case, abandoned it, and consequently deprived the petitioner of any opportunity to be heard at all." *Id.* at 81.

---

[4] This Court is not persuaded by petitioner's speculation that "[t]here can be no other reasonable explanation for the [Supreme] Court's inclusion of the 'ordinarily'" other than to provide for relief based on habeas counsel's omissions in capital cases. (Dkt. 187.) To the contrary, an equally plausible interpretation is that the Court used the modifier "ordinarily" to suggest that in some cases habeas counsel's omissions may be so egregious that they do in fact affect the integrity of the proceedings.

While the courts in *Post* and *Gray* applied *Gonzalez* to reject 60(b) motions, and therefore had no need to evaluate habeas counsel's performance, the deficiencies in those cases were far more egregious than anything alleged against Petitioner's habeas counsel. In *Post*, for example, the petitioner's case was passed "from attorney-to-attorney" in a "short-handed" public defender's office; none of the attorneys ever conducted the court-authorized discovery. 422 F.3d at 421. In *Gray*, habeas counsel failed to provide the district court with state trial transcripts and other documents needed to evaluate his claim of ineffective assistance of trial counsel; as a result, the claim was denied. 171 Fed.Appx. at 743.

Here, by contrast, Petitioner has not demonstrated that his habeas counsel performed so ineffectively that the integrity of the proceedings was undermined. They did not abandon Petitioner, but pursued his claims assiduously over the course of seven years; a review of counsel's billing records shows that Ms. Ryan alone devoted more than 1,000 hours to Petitioner's case.[5] The only source for the allegation of deficient performance is the self-criticism offered by Ms. Ryan in her motion to withdraw filed with the Ninth Circuit. (Dkt. 184.) However, in her motion, Ms. Ryan does not appear to acknowledge, as Petitioner now asserts, that habeas counsel failed to identify and present every claim; rather, she contends that, applying "hindsight and a new review," she and Mr. Hirsch "failed to present to the District Court all of the individual claims in a clear and concise manner." (*Id.* at 8.) Ms. Ryan also cites the novelty of the AEDPA, the application of which had yet to be clarified by the United States Supreme Court, as a basis for counsel's failure to present Petitioner's claims in a more coherent fashion. (*Id.* at 6-7.) Of course, that difficulty was faced by every habeas lawyer in the period following the enactment of the AEDPA.

---

[5] Petitioner does not contend that habeas counsel were statutorily unqualified to represent Petitioner. Ms. Ryan, for instance, as noted in her motion to withdraw, had previously been appointed to three other capital habeas cases. (Dkt. 184 at 7.)

Petitioner now alleges that habeas counsel unreasonably failed to raise several valid claims and failed to investigate Petitioner's neurological functioning.[6] However, he provides no support for the viability of these claims against procedural or merits-based challenges. If a *Strickland*-style analysis of counsel's performance were appropriate – and it cannot be, given that there is no constitutional right to habeas counsel, *see Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) – Petitioner's claim of ineffective assistance of habeas counsel falls far short of satisfying either the deficiency or the prejudice prong.

Finally, Petitioner contends that his argument for a right to effective assistance of habeas counsel is supported by the holdings in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003), and *Comer v. Schriro*, 463 F.3d 934, 948-49 (9th Cir. 2006). In the former case, the Ninth Circuit did not, as Petitioner misleadingly writes, "construe[] '21 U.S.C. § 848(q)(4)(B) to incorporate a statutory right to competence' of federally appointed habeas counsel in capital proceedings. 334 F.3d at 813 [sic]." (Dkt. 187 at 6.) In fact, when the *Rohan* court "constru[ed] 21 U.S.C. § 848(q)(4)(B) to incorporate a statutory right to competence," 334 F.3d at 814, it was referring to the petitioner's competence – i.e., his mental state and

---

[6] According to Petitioner, habeas counsel failed to challenge the voluntariness of Petitioner's confession, the trial court's refusal to instruct the jury on lesser-included offenses, the trial court's failure to provide the jury with two forms of verdict on the first-degree murder charge, and the State's failure to provide timely notice of aggravating factors. (Dkt. 180 at 5.)

"ability to communicate" with counsel, *id.* at 813 – not to a statutory right to competent performance of habeas counsel, about which the court said nothing. Petitioner's reliance on *Comer*, 463 F.3d at 948-49, is equally unavailing. In *Comer*, a panel of the Ninth Circuit held that the petitioner did not have the right to waive his habeas appeal, despite being competent to do so; according to the court, such a waiver would violate the Eighth Amendment by preventing meaningful federal review of his habeas claims. *Id.* As Respondents note, the panel opinion was subsequently withdrawn and the Ninth Circuit, sitting en banc, reversed and dismissed the petitioner's appeal.[7] *Comer v. Schriro*, --- F.3d ----, 2007 WL 764434 (9th Cir. 2007).

In conclusion, Petitioner's argument for relief under Rule 60(b)(6) based upon a purported statutory right to effective assistance of habeas counsel fails for the following reasons: first, in *Gonzalez* the United States Supreme Court indicated, and thereafter circuit courts have uniformly held, that a Rule 60(b) motion citing ineffective assistance of habeas counsel is a second or successive petition because it implicates the merits of the petitioner's claims; second, 18 U.S.C.

---

[7] Petitioner relied on *Comer* for the proposition that his Eighth Amendment rights were violated because habeas counsel's errors prevented a meaningful federal review of his sentence; without such a review, according to Petitioner, he was denied "'the dignity of being treated fairly and justly by a state that claims the power of life and death over his person.'" (Dkt. 180 at 9, quoting *Comer*, 463 F.3d at 951.) *Comer* having been reversed, Petitioner appears to have abandoned this argument, which does not reappear in his reply.

§ 3599 does not establish a right to effective assistance of habeas counsel, but only a right to qualified counsel, while the AEDPA, in § 2254(i), explicitly states that ineffectiveness of habeas counsel shall not be a basis for relief; and, finally, Petitioner has failed to show that habeas counsels' performance meets any standard of ineffectiveness or incompetence, from "abandonment" to Strickland's two-pronged test, such that the integrity of the habeas proceedings was undermined.

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) (Dkt. 180) is **DENIED.**

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to the Clerk of the Ninth Circuit Court of Appeals.

DATED this 2nd day of May, 2007.

s/________________________
Paul G. Rosenblatt
United States District Judge

APPENDIX L

RULE 32.6

Additional Pleadings; Summary Disposition; Amendments

a. **Prosecutor's Response.** Forty-five days after the filing of the petition, the state shall file with the court and send to the defendant or counsel for the defendant, a response. Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached to it. On a showing of good cause, the state may be granted a thirty day extension to file a response. Additional extensions shall be granted only in extraordinary circumstances.

b. **Defendant's Reply.** Within fifteen days after receipt of the response, the defendant may file a reply. Extensions shall be granted only in extraordinary circumstances.

c. **Summary Disposition.** The court shall review the petition within twenty days after the defendant's reply was due. On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law. If a hearing is ordered, the state shall notify the victims, upon the victims' request pursuant to statute or court rule relating to victims' rights, of the time and place of the hearing.

d. **Amendment of Pleadings.** After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

Amended June 2, 1992, effective Dec. 1, 1992; nunc pro tunc effective Sept. 30, 1992 by order dated Sept. 24, 1992.